Congress's Authority to Influence and Control Executive Branch Agencies

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Congress's Authority to Influence and Control Executive Branch Agencies

The Constitution neither establishes administrative agencies nor explicitly prescribes the manner by which they may be created. Even so, the Supreme Court has generally recognized that Congress has broad constitutional authority to establish and shape the federal bureaucracy. Congress may use its Article I lawmaking powers to create federal agencies and individual offices within those agencies, design agencies' basic structures and operations, and prescribe, subject to certain constitutional limitations, how those holding agency offices are appointed and removed. Congress also may enumerate the powers, duties, and functions to be exercised by agencies, as well as directly counteract, through later legislation, certain agency actions implementing delegated authority.

SUMMARY

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The most potent tools of congressional control over agencies, including those addressing the structuring, empowering, regulating, and funding of agencies, typically require enactment of legislation. Such legislation must comport with constitutional requirements related to bicameralism (i.e., it must be approved by both houses of Congress) and presentment (i.e., it must be presented to the President for signature). The constitutional process to enact effective legislation requires the support of the House, Senate, and the President, unless the support in both houses is sufficient to override the President's veto.

There also are many non-statutory tools (i.e., tools not requiring legislative enactment to exercise) that may be used by the House, Senate, congressional committees, or individual Members of Congress to influence and control agency action. In some cases, non-statutory measures, such as impeachment and removal, Senate advice and consent to appointments or the ratification of treaties, and committee issuance of subpoenas, can impose legal consequences. Others, however, such as House resolutions of inquiry, may not be used to bind agencies or agency officials and rely for their effectiveness on their ability to persuade or influence.

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The Constitution neither establishes administrative agencies nor explicitly prescribes the manner by which they may be created. Even so, the Supreme Court has generally recognized that Congress has broad constitutional authority over the establishment and shape of the federal bureaucracy.[1] This power stems principally from the combination of Congress's enumerated powers under Article I of the Constitution to legislate on various matters;[2] language in Article II, Section 2, which authorizes the appointment of "officers" to positions "which shall be established by law";[3] and Article I, Section 8, which authorizes Congress to "make all laws which shall be necessary and proper for carrying into execution" not only Congress's own enumerated powers, but "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[4] Acting pursuant to its broad constitutional authority, Congress may create federal agencies and individual offices within those agencies, design agencies' basic structures and operations, and prescribe, subject to certain constitutional limitations, how those holding such offices are appointed and removed.[5] Congress also may enumerate the powers, duties, and functions to be exercised by agencies, as well as directly counteract, through later legislation, certain agency actions implementing delegated authority.[6]

The most potent tools of congressional control over executive branch agencies, including structuring, empowering, regulating, and funding agencies, typically require enactment of legislation.[7] Such legislation must comport with the constitutional requirements of bicameralism (i.e., it must be approved by both houses of Congress) and presentment (i.e., it must be presented to the President for signature).[8] For legislation to take effect, that constitutional process requires the support of the House, Senate, and the President, unless the support in both houses is sufficient to override the President's veto.[9]

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[1] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 500 (2010) ("Congress has plenary control over the salary, duties, and even existence of executive offices."); Myers v. United States, 272 U.S. 52, 129 (1926) ("To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation.").

[2] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (conferring Congress with power to regulate foreign and interstate commerce), cl. 11-16 (defining Congress's power to declare war and to raise, support, and regulate the military and militia).

[3] *Id.* art. II, § 2, cl. 2.

[4] *Id.* art. I, § 8, cl. 18.

[5] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 138–39 (1976) (per curiam) ("Congress may undoubtedly under the Necessary and Proper Clause create 'offices' in the generic sense and provide such method of appointment to those 'offices' as it chooses."); Humphrey's Ex'r v. United States, 295 U.S. 602, 631 (1935) ("Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office....").

[6] See Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928))); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it."). See, e.g., Disapproving the Rule Submitted by the Department of the Interior known as the Stream Protection Rule, P.L. 115-5, 131 Stat. 10 (2017); Disapproving the Rule Submitted by the Department of Labor Relating to Drug Testing of Unemployment Compensation Applicants, P.L. 115-17, 131 Stat. 81 (2017).

[7] *See* Immigration & Naturalization Servs. v. Chadha, 462 U.S. 919, 951 (1983).

[8] U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States....").

[9] *Id.* (requiring the approval of two-thirds of each house to override a presidential veto).

But Congress does not always need to act through legislation to impact agency decisionmaking. Several tools available to the House, Senate, congressional committees, and even individual Members of Congress may be employed to influence agency action. Some tools are explicitly enumerated in the Constitution, such as impeachment and subsequent removal from office, and Senate advice and consent to the ratification of treaties and the appointment of certain executive officers, ambassadors, and judges.[10] Under these provisions, the Constitution has explicitly authorized an individual house of Congress to act unilaterally with binding legal effect. Other tools, however, are both non-constitutional (i.e., they are not explicitly established in the Constitution) and non-statutory (i.e., they do not require enactment of legislation). Most of these non-constitutional, non-statutory tools, while capable of influencing agency decisionmaking, cannot themselves legally compel agency action.[11] This distinction between the compulsory nature of statutory enactments and the non-binding nature of most (though not all)[12] non-statutory legislative actions is essential to understanding the scope of congressional authority over federal agencies.

Statutory Control of Executive Branch Agencies

Congress's power to create agencies is well established. Members of the First Congress viewed the Constitution as contemplating the creation of "departments of an executive nature" to "aid" the President in the execution of law.[13] Toward this end, the First Congress enacted measures creating the Departments of Foreign Affairs, Treasury, and War.[14] At this early stage, Congress sought to ensure it retained some degree of influence and control over the new departments. The Secretary of the Treasury, for example, had to report directly to Congress, either "in person or in writing," on "all matters referred to him by the Senate or the House."[15]

Yet the debates of the First Congress also provide evidence of Congress's acknowledgment of what would become the delicate, and at times uneasy, balance between congressional creation and control of agencies and the President's authority to supervise executive officials pursuant to his constitutional obligation to "Take Care that the laws be faithfully executed."[16] From the very outset, Congress wrestled with defining the scope of both presidential and congressional control of executive agencies. For example, in 1789 Congress engaged in a historically significant debate on the President's authority to remove the Secretary of Foreign Affairs.[17] Although Members' views differed, ultimately the prevailing position was "in favor of declaring the power of removal to be in the President," rather than in the Congress.[18] Similarly, a proposal to structure the

[10] *Id.* § 2 ("The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."); *id.* § 3 ("The Senate shall have the sole Power to try all Impeachments."); *id.* art. II, § 2.

[11] Immigration & Naturalization Servs. v. Chadha, 462 U.S. 919, 951–59 (1983).

[12] Exceptions include certain committee oversight actions, such as the issuance of subpoenas, which do impose legal obligations on witnesses without compliance with bicameralism and presentment. *See infra* "Committee Investigative Oversight."

[13] 1 ANNALS OF CONG. 383 (1789) (statement of Rep. Elias Boudinot) (noting that the Constitution "contemplates departments of an executive nature in aid of the President").

[14] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 36-47 (1997).

[15] An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65, 66 (1789).

[16] U.S. CONST. art. II, § 3.

[17] Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1022 (2006) (describing the 1789 debate as "one of the most significant yet less-well-known constitutional law decisions").

[18] Myers v. United States, 272 U.S. 52, 112 (1926). *But see* CURRIE, *supra* note 14, at 41 (noting that "there was no consensus as to whether the [President] got [the removal] authority from Congress or from the Constitution itself").

Department of the Treasury as a multi-member commission, partly to insulate the agency from presidential control, was debated and eventually rejected out of concern that such a body would not be able to administer effectively the finances of the new government.[19]

As reflected in the debates of the First Congress and confirmed by later Supreme Court decisions, Congress's power over the administrative state, though broad, is not unlimited. In particular, constraints on congressional power over executive agencies flow from the foundational constitutional doctrine of the separation of powers. Although the text of the Constitution distributes the legislative, executive, and judicial powers among the three branches of government,[20] the Supreme Court has not endorsed any absolute separation. The allocation of powers was never intended to cause the branches to be "hermetically sealed,"[21] or, in the words of Justice Oliver Wendell Holmes, divided into "fields of black and white."[22] Instead, observed Justice Robert Jackson, the separation of powers "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity."[23] It is a doctrine generally characterized by ambiguity and overlap rather than bright-line rules. Yet some well-established principles govern the relationship between Congress and the administrative state. For example, Congress may neither displace executive authority by directly implementing the law itself,[24] nor appoint or reserve for itself the power to remove (except through impeachment) executive officers engaged in the execution of law.[25] On the other end of the spectrum, the separation of powers is not violated merely by Congress directing, prohibiting, or otherwise legislating on most forms of agency action.[26]

It would appear that the chief substantive limitations on Congress's ability to control the executive branch arise from specific constitutional provisions and implied principles—intimately connected to the separation of powers—that buttress the general division of power among the branches. These provisions and principles, which include the Appointments Clause, the Take Care Clause, and the President's authority to supervise the executive branch, are addressed below in conjunction with Congress's statutory powers.

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[19] *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 975 (2001).

[20] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States...."); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[21] Immigration & Naturalization Servs. v. Chadha, 462 U.S. 919, 951 (1983).

[22] Springer v. Gov't of Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting); *see also* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2035 (2020) ("Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers.... A balanced approach is necessary, one that takes a considerable impression from the practice of the government, and resists the pressure inherent within each of the separate Branches to exceed the outer limits of its power.") (citations, brackets, and internal quotation marks omitted).

[23] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[24] *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 265–77 (1991).

[25] *See* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam); Bowsher v. Synar, 478 U.S. 714, 733–34 (1986). *See infra* "Limitations Imposed by the Appointments Clause."

[26] The separation of powers may, however, be violated when that direction or prohibition infringes upon other core presidential powers, such as the exclusive power of the President to recognize foreign states. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2096 (2015) (holding that a statute directing the State Department, upon request, to designate the place of birth of a U.S. citizen born in Jerusalem as "Israel," in contravention of long-standing executive policy, infringed upon the President's foreign recognition power).

Four Pillars of Statutory Control

Congress's ability to control administrative agencies through the exercise of legislative power is a holistic endeavor perhaps best understood as built upon four basic pillars: structural design, delegation of authority, procedural controls on agency decisionmaking, and agency funding. Reliance on each pillar, however, is informed by separation-of-powers principles.

Structural Design

How an agency is structured invariably affects how it operates, and what sort of relationship it has with the Congress and the President.[27] In creating a federal agency, Congress may structure or design the agency in several ways. Many of Congress's structural choices affect the independence of agencies by shaping the degree to which the President can assert control over them. These structural choices are wide-ranging, but generally relate to agency leadership, appointment and removal of officers, and presidential supervision. For example, subject to constitutional considerations explained below, Congress may

- structure agency leadership in the form of a multi-member commission or a single head;[28]
- create agency offices, which may be filled by persons appointed by the President with the advice and consent of the Senate, or in the case of "inferior" offices, vest the power of appointment in the President, the head of a department, or the "Courts of Law";[29]
- establish certain statutory qualifications for appointees, often based on political affiliation or substantive experience, or dictate the length of an official's term of office;[30]
- choose to make an agency freestanding, or place it within an existing department or agency;[31]

[27] "Structure" as Justice Antonin Scalia said, "is destiny," meaning that an agency's defining structural characteristics often have a substantial impact on the agency's future actions and operation. *See* Gregory M. Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 145 (2001) (quoting Justice Antonin Scalia, Address at Regent University (Fall 1998)). *See also*, Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 278–88 (2017) (studying the impact agency design features have on congressional oversight).

[28] *Compare* 15 U.S.C. § 78d(a) (creating "a Securities and Exchange Commission ... composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate"), *with* 42 U.S.C. § 7131 ("There shall be at the head of the Department a Secretary of Energy ... who shall be appointed by the President by and with the advice and consent of the Senate. The Department shall be administered, in accordance with the provisions of this chapter, under the supervision and direction of the Secretary.").

[29] U.S. CONST. art. II, § 2, cl. 2.

[30] *See, e.g.*, 52 U.S.C. § 30106(a)(1)–(2) (providing that the members of the Federal Election Commission shall serve single six-year terms, "[n]o more than 3 [of whom] ... may be affiliated with the same political party"); 5 U.S.C. § 1201 (establishing background and political affiliation requirements for members of the Merit Systems Protection Board); 12 U.S.C. § 4512(b)(1) (establishing that the Director of the Federal Housing Finance Agency "have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets"). For a broader discussion of statutory qualifications see CRS Report RL33886, *Statutory Qualifications for Executive Branch Positions*, by Henry B. Hogue.

[31] *Compare* 5 U.S.C. § 1211 (establishing the freestanding Office of Special Counsel), *with* 50 U.S.C. § 2401 (establishing the National Nuclear Security Administration within the Department of Energy).

- provide that an agency official serve at the pleasure of the President, or, in certain situations,[32] be protected from removal except in cases of "inefficiency, neglect of duty, or malfeasance in office";[33] or
- choose to exempt an agency from certain aspects of presidential supervision—for example by excusing the agency from complying with generally applicable executive branch requirements that agency rules, legislative submissions, and budget requests be reviewed and cleared by the White House.[34]

Although Congress may wish to insulate an agency from presidential control through these structural choices, fundamental constitutional requirements must be complied with in designing federal agencies. These limits, two of which are discussed below, generally exist to ensure that executive branch officials remain accountable to the President, and ultimately the public, for their actions.[35]

Limitations Imposed by the Appointments Clause

The Appointments Clause imposes significant limitations on the structural choices that Congress may make in determining how executive agency officials are appointed.[36] Under the Clause, principal officers must be appointed by the President, "with the Advice and Consent of the Senate," while Congress may vest the appointment of "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments."[37] Non-officers—that is, "mere employees"—are not subject to any constitutionally required method of appointment.[38]

The breadth of authority that an executive branch official exercises typically determines the official's classification as either an officer or non-officer for Appointments Clause purposes.[39] Generally, if an executive official holds a "continuing position established by law" and "exercis[es] significant authority pursuant to the laws of the United States," he is an "Officer of the United States."[40] The applicable standard for distinguishing between principal officers—who must be appointed with the advice and consent of the Senate—and inferior officers—whose

[32] *See infra* note 67.

[33] *See, e.g.*, 42 U.S.C. §7171(b) (providing that commissioners on the Federal Energy Regulatory Commission "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

[34] *See* 12 U.S.C. § 250 (excusing financial regulators from review of "legislative recommendations, or testimony, or comments on legislation").

[35] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498 (2010) (noting the role an "effective chain of command" plays in ensuring accountability); Edmond v. United States, 520 U.S. 651, 660 (1997) ("By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.").

[36] U.S. CONST. art. II, § 2, cl. 2.

[37] *Id.*

[38] Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (explaining that officers constitute "a class of government officials distinct from mere employees"); *see* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam) (stating that "[e]mployees are lesser functionaries subordinate to officers of the United States"). Congress exercises significant authority over the hiring and separation of "employees." *See, e.g.*, 5 U.S.C. §§ 2101–11001 (governing members of the civil service and other federal employees).

[39] *See, e.g.*, *Edmond*, 520 U.S. at 662 (acknowledging that military appellate judges exercise "significant authority"); Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 881–82 (1991) (holding that special trial judges of an Article I tax court are "Officers of the United States" based on the degree of authority they exercise); *Buckley*, 424 U.S. at 138 (concluding that members of the Federal Election Commission exercised "significant authority").

[40] *Lucia*, 138 S. Ct. at 2051 (citing United States v. Germaine, 99 U.S. 508, 511 (1879); *Buckley*, 424 U.S. at 126 (internal quotation marks omitted)).

appointment Congress may vest elsewhere—is arguably less clear.[41] At times, the Supreme Court has adopted an approach that suggests the distinction between a principal and inferior officer hinges mainly on whether the officer is subject to supervision by some higher official, and not on the amount of overall authority exercised.[42] Under this approach, principal officers are generally subject only to supervision by the President, while inferior officers are generally subject to supervision by a higher-ranking, Senate-confirmed official.[43]

Thus, in designing agencies, Congress generally has little discretion in directing the method of appointment for most agency heads. If an agency head exercises significant authority on a continuing basis and is supervised only by the President, he or she qualifies as a principal officer and must be appointed by the President with the advice and consent of the Senate.[44] However, Congress has some discretion in choosing the appointing official for inferior officers. For example, Congress can vest the appointment of an "inferior" agency official in the head of a department or in the "Courts of Law" to either provide an official with some independence from the President or to prevent the President from nominating an official of his own choosing.[45] That said, Congress may not reserve for itself the authority to appoint any officer, whether principal or inferior.[46]

Limitations Imposed by Principles of Presidential Control

The President's general authority to supervise and oversee the executive branch also limits the structural choices Congress may make in designing agencies. These limits are often implicated by statutory provisions that seek to insulate an agency from presidential control by providing agency leaders with removal protections. For example, "for cause" removal protections generally prevent the President from removing an identified official except in cases of "inefficiency, neglect of duty, or malfeasance in office."[47] Generally, these and other removal provisions cannot be used to deprive the President of his constitutional duty to "oversee the faithfulness of the officers who execute" the law.[48]

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[41] *Edmond*, 520 U.S. at 661 ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes.").

[42] *Id.* at 663; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010). At times, the Court has employed a functional analysis that would suggest that the principal/inferior distinction is governed by a linear evaluation of the degree of authority exercised. *See* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (deciding that "[s]everal factors lead to th[e] conclusion" that the independent counsel is an inferior officer); *accord* Seila Law LLC v. Consumer Fin. Prot. Bd., 140 S. Ct. 2183, 2199 n.3 (2020) (explaining that, in the past, the Court has "examined factors such as the nature, scope, and duration of an officer's duties" to determine whether an official is an inferior officer, and that, "[m]ore recently, [it has] focused on whether the officer's work is directed and supervised by a principal officer" in making such a determination) (internal quotation marks omitted).

[43] *Edmond*, 520 U.S. at 663.

[44] *Cf. id.* ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.").

[45] U.S. CONST. art. II, § 2, cl. 2. Congress's discretion to vest the appointment of an inferior executive branch official in the courts is not unlimited. For example, in *Morrison v. Olson*, the Court stated that such "interbranch appointments" may be improper if the judicial appointment "had the potential to impair the constitutional functions assigned to one of the branches," or "if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint." 487 U.S. at 676.

[46] Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam).

[47] *See, e.g.*, 42 U.S.C. § 7171(b) (providing that commissioners on the Federal Energy Regulatory Commission "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

[48] *Free Enter. Fund*, 561 U.S. at 484.

The Supreme Court has established that by vesting the President with both "the executive Power" and the personal responsibility to ensure the faithful execution of the laws, Article II confers upon the presidency the "administrative control" of the executive branch.[49] The President's ability to ensure accountability through removal of executive branch officials has long been viewed as an essential aspect of this ability to oversee the enforcement and execution of the law, as "the power to remove is the power to control."[50]

The Supreme Court has outlined the extent of the President's authority to oversee the executive branch through removal in a series of seminal cases. The 1926 decision of *Myers v. United States* invalidated a statutory provision that prohibited the President from removing an executive official without first obtaining the advice and consent of the Senate and established the general proposition that Article II grants the President "the general administrative control of those executing the laws, including the power of appointment and removal of executive officers."[51] *Myers* was curtailed shortly thereafter in the 1935 decision of *Humphrey's Executor v. United States*,[52] where the Court held that Congress could limit the President's ability to remove members of the multi-member Federal Trade Commission (FTC) by providing its commissioners with "for cause" removal protections.[53] The Court again approved of statutorily imposed for cause removal protections in *Morrison v. Olson*, this time as applied to the independent counsel, an officer who was authorized to conduct independent investigations and prosecutions of high-level executive officials.[54] Focusing on whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty,"[55] the Court held that Congress had afforded the President adequate authority to oversee the independent counsel and ensure that the official faithfully executed and enforced the law.[56] In *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*,[57] the Court invalidated statutory provisions providing that members of the PCAOB could be removed only for cause by the Securities and Exchange Commission, whose members were, in turn, also protected from removal by for cause removal protections.[58] By insulating PCAOB members from presidential control with dual layers of for cause removal protections, the law had "impaired" the President's necessary authority to "hold[] his subordinates accountable for their conduct" and "subvert[ed] the President's ability to

[49] *Id.* at 492–93 (quoting Myers v. United States, 272 U.S. 52, 164 (1926)).

[50] *Id.* at 497 ("The diffusion of power carries with it a diffusion of accountability."); *In re* Aiken Cty., 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

[51] *Myers*, 272 U.S. at 164.

[52] 295 U.S. 602 (1935). *See* Wiener v. United States, 357 U.S. 349, 352 (1958) ("The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.").

[53] *Humphrey's Ex'r*, 295 U.S. at 619–20.

[54] The independent counsel was removable by the Attorney General "only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability) or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596. The independent counsel provisions have since sunset. *See id.* § 599 (authorizing the Independent Counsel for five years).

[55] *Morrison*, 487 U.S. at 693–96.

[56] *Id.* at 696 ("Notwithstanding the fact that the counsel is to some degree 'independent' and free from executive supervision to a greater extent than other federal prosecutors, in our view ... the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.").

[57] 561 U.S. 477 (2010).

[58] *Id.* at 491-98.

ensure that the laws are faithfully executed."[59] The Court most recently assessed the constitutional dimensions of presidential control in *Seila Law LLC v. Consumer Financial Protection Bureau (CFPB)*.[60] In *Seila Law*, the Court held that the structure of the CFPB violated the constitutional separation of powers.[61] The CFPB, an independent agency, is led by a single Director who wields substantial executive powers and until *Seila Law*, was removable by the President only for cause.[62] The Court reasoned that there was scant historical precedent for imbuing a principal officer who was solely in charge of an agency with for cause removal protection, a result that itself indicated a constitutional infirmity in the Court's view.[63] The Court also based its decision on the Constitution's structure, which places the executive power in one person, the President, who is the only government official (with the exception of the Vice President) accountable to the entire country through national elections.[64] "The CFPB's single-Director structure," wrote the Court, "contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual" who, because of his for cause removal protection, is "accountable to no one."[65]

These removal cases impose significant, if somewhat undefined, limitations on Congress's authority to structure an agency to insulate certain officials from presidential control.[66] For example, the Court has suggested that there are certain "purely executive" officials,[67] and these persons "must be removable by the President at will if he is to be able to accomplish his constitutional role."[68] For this reason it is likely that congressional attempts to provide a traditional Cabinet official with "for cause" removal protections would be viewed as placing an impermissible obstruction on the President's ability to carry out his executive functions.[69] In any

[59] *Id.* at 496–98.

[60] 140 S. Ct. 2183 (2020).

[61] *Id.* at 2197.

[62] *Id.* at 2193.

[63] *Id.* at 2201-02.

[64] *Id.* at 2203.

[65] *Id.* In *Collins v Mnuchin*, No. 19-422 (consolidated with *Mnuchin v. Collins*, No. 19-563), the Supreme Court is tasked with determining whether the structure of the Federal Housing Finance Agency (FHFA) is unconstitutional. The FHFA is led by a single Director who is only removal "for cause." *See* 12 U.S.C. § 4512(a), (b)(2). The U.S. Court of Appeals for the Fifth Circuit had held that the structure of the FHFA was constitutionally invalid. *See* Collins v. Mnuchin, 938 F.3d 553, 587-88 (5th Cir. 2019) (en banc). Oral argument before the Supreme Court was held in December 2020. *See Docket*, No. 19-422, https://www.supremecourt.gov/docket/docketfiles/html/public/19-422.html.

[66] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 516 (2010) (Breyer, J., dissenting) ("The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President. Nor does the separation-of-powers principle grant the President an absolute authority to remove *any and all* Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President's authority to remove an officer from his post.") (citations omitted).

[67] *See* Myers v. United States, 272 U.S. 52, 132 (1926) ("The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act.").

[68] *Morrison*, 487 U.S. at 690.

[69] *Id.*; PHH Corp. v. CFPB, 881 F.3d 75, 107 (D.C. Cir. 2018) (en banc) (holding that "there are executive officials whom the President must be able to fire at will.... Those would surely include Cabinet members—prominently, the Secretaries of Defense and State—who have open-ended and sweeping portfolios to assist with the President's core constitutional responsibilities.... Executive functions specifically identified in Article II would be a good place to start in understanding the scope of that executive core: It includes, at least, the President's role as Commander in Chief, and the foreign-affairs and pardon powers") (citations omitted).

event, providing certain officials with removal protections remains a useful tool for encouraging independence from the President and, possibly, greater responsiveness to Congress.[70]

Delegation of Authority

In general, an agency has only that authority which has been delegated to it by Congress.[71] Thus, Congress can control a federal agency by detailing its jurisdiction and authority, setting policy goals for the agency to accomplish in the exercise of that authority, and choosing whether it may regulate the public.[72] Similarly, Congress may choose to grant an agency the authority to issue legislative rules, enforce violations of law, or adjudicate claims made to the agency.[73] The more precise a delegation, the less discretion is afforded to the agency in its execution of its delegated authority.[74]

Congress's control over agency authority is not limited to initial decisions made when the agency was established. Instead, the authority delegated to an agency can generally be enlarged, narrowed, or altered at any time by Congress.[75] Nor does delegated authority need to be permanent. Congress often uses sunset provisions to terminate a delegation on a specified date.[76] Congress may also reject an agency's specific exercise of delegated power through legislation.[77]

Congress is not, however, unconstrained in its ability to empower agencies. One limitation on Congress's ability to delegate authority to a federal agency is the non-delegation doctrine. As opposed to the appointment and removal doctrines, which limit Congress's ability to encroach upon or restrict executive authority, the non-delegation doctrine limits the extent to which Congress may bestow legislative authority on other entities, including the executive branch.[78]

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[70] *See, e.g.*, CRS Report R46762, *Congress's Authority to Limit the Removal of Inspectors General*, by Todd Garvey.

[71] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[72] *See* J.R. Deshazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456 (2003) (noting that one of Congress's "primary mechanisms to control delegated power" is the use of "statutory language that circumscribes the scope of agency authority" by establishing "substantive standards or limits that the agency must implement").

[73] *See, e.g.*, 12 U.S.C. § 5512(a) (granting CFPB the authority to "administer, enforce, and otherwise implement" delegated authority); 42 U.S.C. § 405(b)(1) (granting the Commissioner of the Social Security Administration the authority to "make findings of fact, and decisions as to the rights of any individual applying for a [benefits] payment").

[74] *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 77–78 (2006) ("A key formal method Congress employs to control executive discretion is to nip discretion in the bud by legislating with precision.").

[75] *See* Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976, 989 (D. Alaska 2018) ("The authority of an executive agency comes from Congress and is subject to modification by Congress." (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000))).

[76] *See, e.g.*, 16 U.S.C. § 6809 ("The authority of the Secretary to carry out this Act shall terminate September 30, 2019."); 54 U.S.C. § 101938 ("The authority given to the Secretary under this subchapter shall expire 7 years after the date of the enactment of this subchapter.").

[77] Congress can reverse agency decisions through the enactment of ordinary legislation, but it has also created certain procedural mechanisms to fast-track its disapproval of some agency actions. *See, e.g.*, 5 U.S.C. §§ 801–808 (providing for the rejection of an agency rule through enactment of a joint resolution of disapproval); 42 U.S.C. § 2153(d) (providing for the enactment of a joint resolution of disapproval relating to nuclear cooperation agreements).

[78] Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935). The delegation of authority to private entities can also raise constitutional concerns. *See* CRS Recorded Event WRE00214, *Privatization and the Constitution: Limits on Congress's Power to Privatize*, by Linda Tsang; CRS Report R44965, *Privatization and the Constitution: Selected Legal Issues*, by Linda Tsang and Jared P. Cole.

This doctrine is based in the separation of powers and works to prevent Congress from abdicating the core legislative function assigned to it by Article I of the Constitution.[79]

In practice, the non-delegation doctrine does not, by itself, generally function as a substantial limitation on the powers that Congress may provide to a federal agency.[80] Although the Supreme Court has declared categorically that "the legislative power of Congress cannot be delegated,"[81] the standard for determining whether Congress has in fact delegated "legislative authority" is more lenient than this statement might suggest.[82] For a delegation to survive scrutiny, Congress need only establish an "intelligible principle" to govern the exercise of the delegated power.[83] The "intelligible principle" test requires that Congress delineate reasonable legal standards for when that power may be exercised.[84] According to the Court's doctrine, when a delegation is accompanied by an "intelligible principle," Congress confines the degree of discretion that an

[79] Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."); *Panama Refining Co.*, 293 U.S. at 421 ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.").

[80] The Supreme Court has not invalidated a law for violation of the doctrine since 1935. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 527–38 (1935) (concluding that authorizing the Federal Trade Commission to establish "codes of fair competition" constituted an unconstitutional delegation "to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."). The Supreme Court has previously found broad delegations authorizing an agency to regulate in the "public interest" or in a "fair and equitable" manner to satisfy the intelligible principle test. Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1940); Yakus v. United States, 321 U.S. 414, 420 (1944). There have, however, been recent developments in non-delegation doctrine jurisprudence. In *Association of American Railroads v. Department of Transportation*, for example, the U.S. Court of Appeals for the D.C. Circuit invalidated a delegation not on the grounds that Congress had failed to provide the agency with an intelligible principle, but because Congress violates due process when it provides a "self-interested entity with regulatory authority over its competitors." 896 F.3d 539, 553 (D.C. Cir. 2018).

In its most recent treatment of the non-delegation doctrine, *see* Gundy v. United States, 139 S. Ct. 2116 (2019), a four-Justice plurality, in an opinion authored by Justice Kagan and joined by Justices Breyer, Ginsburg, and Sotomayor, applied the intelligible principle test to uphold the congressional delegation of authority at issue in that case. *Id.* at 2129-30 (plurality opinion). Justice Alito concurred in the judgment, but explained that he would support reconsidering the intelligible principle test if a majority of the Court was inclined to do so in the future. *Id.* at 2131 (Alito, J., concurring). Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, would have reconsidered the Court's modern approach to non-delegation questions. *Id.* at 2131 (Gorsuch, J., dissenting); *see id.* at 2139 (arguing that, in the late 1940s, courts began to apply a "mutated version of the 'intelligible principle' remark" first expressed by the Court in its 1928 decision of *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), that had "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked"). Justice Kavanaugh, who joined the Court after oral arguments in *Gundy*, did not participate in the decision. *See id.* at 2120 (plurality opinion). And since the Court considered *Gundy*, Justice Barrett has joined the High Court, having been nominated to fill the vacancy left by the death of Justice Ginsburg. *See* CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis, at 1.

[81] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

[82] *See, e.g.*, *Panama Refining Co.*, 293 U.S. at 340 (invalidating delegation of authority to the President to regulate the interstate transport of oil under the National Industrial Recovery Act); *Schechter Poultry*, 295 U.S. at 542 (invalidating delegation of authority to the President to approve fair competition codes).

[83] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized ... is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[84] *See, e.g.*, *Panama Refining Co.*, 293 U.S. at 421 ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

agency possesses in the exercise of that delegation, such that the delegation does not offend the separation of powers.[85]

Congress may also condition an agency's exercise of its delegated authority in various ways. For example, Congress can craft legislation establishing that delegated agency authority is triggered only after a specific event occurs, or after a factual determination made by an executive branch official.[86] Congress sometimes enacts "report and wait" provisions that require an agency to report to Congress on a proposed use of delegated authority, and then wait a specific time period before implementing or finalizing that action.[87] The report and wait framework is designed to give Congress the opportunity to enact legislation rejecting the agency's proposed action if desired. Congress has also repeatedly established internal expedited procedures for the rejection of specific agency actions.[88] This approach typically establishes special procedures in each house of Congress for consideration of a joint resolution of disapproval that would overturn agency actions.[89] Under such a review mechanism, the agency has authority to act unless Congress affirmatively rejects or blocks the action through legislative enactment.[90] Congress can also authorize an agency to make proposals to Congress that only become effective when approved through legislation.[91] Under this framework, the agency has no authority to act until a proposal is given legal effect through the enactment of implementing legislation.[92]

Procedural Controls on Decisionmaking

Congress can also exert substantial control over administrative agencies by prescribing the procedures agencies must employ when exercising delegated powers. The Administrative Procedure Act (APA),[93] enacted in 1946, is perhaps the most prominent federal administrative

[85] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests 'all legislative Powers herein granted ... in a Congress of the United States.' This text permits no delegation of those powers.... ") (internal citations omitted); Mistretta v. United States, 488 U.S. 361, 372-73 (1989) ("[T]his Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of ... delegated authority.'" (quoting American Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946))).

[86] *See J.W. Hampton*, 276 U.S. at 407 ("Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive.").

[87] *See* Sibbach v. Wilson & Co., 312 U.S. 1, 8 (1941) (upholding "report and wait" provision). *See, e.g.*, 42 U.S.C. § 10134 (establishing a report and wait framework for the selection of a nuclear waste repository); 28 U.S.C. § 2074(a) (requiring that the proposed amendments to the procedural and evidentiary rules of the federal courts be submitted to Congress before taking effect).

[88] *See, e.g.*, 42 U.S.C. § 2160e(b) (providing for a joint resolution of disapproval relating to nuclear agreements with the Islamic Republic of Iran). *See also* CRS Report RS20234, *Expedited or "Fast-Track" Legislative Procedures*, by Christopher M. Davis.

[89] *See* Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 ADMIN L. REV. 53, 55 (2018) (describing the Congressional Review Act, 5 U.S.C. §§ 801–808, as a "regulatory oversight statute that provides a shortcut mechanism for Congress to overturn agency rules").

[90] The Congressional Review Act, for example, establishes a process by which Congress can reject specific agency rules through a joint resolution of disapproval. *See* 5 U.S.C. §§ 801–808.

[91] For example, under the now-expired Reorganization Act Amendments of 1984, Congress authorized the President to submit a proposed executive branch reorganization plan to Congress, which would take effect upon the enactment of a joint resolution approving the plan. *See* 5 U.S.C. §§ 901–912.

[92] *See* 2 U.S.C. §§ 681–688 (authorizing the President to propose budget rescissions that take effect only when approved by legislation).

[93] 5 U.S.C. §§ 551–559, 701–706.

procedure statute. The APA sets forth the default procedural requirements with which federal agencies[94] generally must comply when conducting rulemaking or administrative adjudication proceedings.[95] Other statutes may supplement or even supersede the APA's procedural requirements.[96]

The power to issue binding law through notice-and-comment rulemaking[97] or administrative adjudication (or both)[98] is one of the most consequential powers with which many agencies are imbued. The APA's procedural requirements are intended to safeguard the rights of the public and entities affected by agency decisions, while also ensuring that agencies retain that degree of flexibility necessary to achieve their delegated responsibilities.[99] For example, before an agency may issue a rule with the force of law, the APA generally requires that it first publish a notice of proposed rulemaking in the *Federal Register*[100] and afford members of the public an opportunity to submit comments on the proposal.[101] An agency's final rule must contain "a concise general statement of [its] basis and purpose" and may generally take effect no earlier than thirty days after issuance.[102] Agencies ordinarily must follow these same procedures when amending or repealing such rules, as well.[103] In the case of agency adjudications that are required (by another statute) to "be determined on the record after opportunity for an agency hearing"[104]—often referred to as

[94] The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." *Id.* § 551(1). Among other things, this definition does not apply to Congress, the judiciary, the District of Columbia, or the military. *Id.* § 551(1)(A)–(B), (D), (F)–(G).

[95] *See id.* §§ 551–559. Courts may not impose procedural requirements on agencies that exceed those prescribed by the APA or other statutes. *See generally* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990); *see also* Beermann, *supra* note 74, at 102. However, agencies are generally free to adopt additional procedures themselves. *See Vt. Yankee*, 496 U.S. at 524 (explaining that "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").

[96] *See infra* text accompanying notes 107–113.

[97] Notice-and-comment, or "informal," rulemaking is the most common type of rulemaking used by agencies. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282 (2010) (noting that informal rulemaking is "far more common" than formal rulemaking). Agencies may also, however, be authorized to issue rules at the culmination of trial-type evidentiary proceedings. *See* 5 U.S.C. §§ 553(c), 556–557.

[98] *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

[99] *Cf.* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996) (writing that the APA struck a balance "between promoting individuals' rights and maintaining agencies' policy-making flexibility").

[100] 5 U.S.C. § 553(b). An agency need not provide public notice of interpretive rules, general policy statements, or "rules of agency organization, procedure, or practice," nor "when [it] for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(A)–(B). None of the informal rulemaking provisions of the APA apply when "there is involved" "a military or foreign affairs function of the United States" or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." *Id.* § 553(a)(1)–(2).

[101] *Id.* § 553(c).

[102] *Id.* § 553(c)–(d). The thirty-days or more effective date does not apply, among other things, "as otherwise provided by the agency for good cause found." *Id.* § 553(d)(3). For more information on agency rulemaking, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey.

[103] *See* 5 U.S.C. § 551(5) (defining "rule making" for purposes of the APA as the "agency process for formulating, amending, or repealing a rule"); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 101 (2015) (explaining that the definition of "rule making" in the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"). For an overview of agency rescissions and alterations of rules with the force of law, see CRS Report R46673, *Agency Rescissions of Legislative Rules*, by Kate R. Bowers and Daniel J. Sheffner.

[104] 5 U.S.C. § 554(a). While the APA prescribes relatively extensive procedures for such adjudications, the majority of

"formal" adjudications—the APA prescribes formalized, trial-like procedures[105] and provides that impartial adjudicators shall preside over such proceedings.[106]

The APA is not the only statute that governs administrative procedure. Many other statutes impose requirements on the procedural governance of large swaths of the executive branch, including the Congressional Review Act,[107] Regulatory Flexibility Act,[108] Freedom of Information Act (FOIA),[109] Federal Records Act,[110] and Paperwork Reduction Act.[111] Through these and similar statutes, Congress can impact agency action by, among other things, requiring or authorizing the use of alternative or substitute procedural mechanisms to subject agencies' actions to increased transparency and public accountability, and ensuring that agencies engage in certain substantive considerations during the decisionmaking process.[112] In addition, some statutes may impose procedural requirements on specific agencies on top of or instead of those required by the APA.[113]

agency adjudication proceedings are primarily governed by other statutes. *See* ABA, SEC. OF ADMIN. L. & REG. PRAC., A GUIDE TO FEDERAL AGENCY ADJUDICATION 176 (2d ed. 2012) ("Perhaps 90 percent of federal agency adjudication is informal rather than formal. With the exception of a few provisions set forth in [5 U.S.C.] §§ 555 and 558, the APA does not spell out the procedures that an agency must follow when engaging in informal adjudication"). Adjudication proceedings that are not regulated by the APA are often collectively known as "informal" adjudication, but informal proceedings can be more procedurally formal than APA adjudications. MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3 (2016). "External sources of law, generally an agency's organic statute, determine the procedural requirements of non-APA adjudicatory proceedings, subject to certain baseline requirements imposed by 5 U.S.C. §§ 555 and 558 and due process." Daniel J. Sheffner, *Access to Adjudication Materials on Federal Agency Websites*, 51 AKRON L. REV. 447, 450 (2017) [hereinafter Sheffner, *Adjudication Materials*]. Section 555 pertains to "ancillary matters" and Section 558 concerns sanctions and licensing. 5 U.S.C. §§ 555, 558.

[105] 5 U.S.C. §§ 554, 556–557. For example, parties to formal proceedings may offer oral or documentary evidence, *id.* § 556(d), cross-examine opposing parties, *id*, and submit proposed findings of fact and conclusions of law, *id.* § 557(c)(1). The agency may receive "[a]ny oral or documentary evidence," but "shall provide for the exclusion of [evidence that is] irrelevant, immaterial, or unduly repetitious...." *Id.* § 556(d). At the conclusion of a formal hearing, the presiding adjudicator issues a decision that contains "a statement of ... findings and conclusions" similar to a judicial opinion. *Id.* § 557(c)(A). *See* Sheffner, *Adjudication Materials*, *supra* note 104, at 450.

[106] 5 U.S.C. § 556(b) (providing that "[t]he functions of presiding employees and of employees participating in decisions in accordance with [5 U.S.C. § 557] shall be conducted in an impartial manner"). In formal adjudications under the APA, the "presiding employee" must be either "the agency," "one or more members of the body which comprises the agency," or "one or more administrative law judges." *Id.* § 556(b)(1)–(3).

[107] *Id.* §§ 801–808 (authorizing Congress to overturn agency rules through joint resolutions of disapproval).

[108] *Id.* §§ 601–612 (directing agencies to consider the effects of regulations on small businesses and other small entities).

[109] *Id.* § 552 (mandating disclosure of wide range of agency records proactively and by request, subject to specific exemptions). FOIA was enacted as an amendment to the APA. For more information on FOIA, see CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Daniel J. Sheffner [hereinafter, Sheffner, *FOIA*].

[110] 44 U.S.C. §§ 3101–3107 (creating records management responsibilities for federal agencies).

[111] *Id.* §§ 3501–3521 (establishing responsibilities for agencies engaged in information collection).

[112] *See* Beermann, *supra* note 74, at 103–05.

[113] *See, e.g.*, 42 U.S.C. § 7607(d)(1) (listing rulemakings to which the Clean Air Act rulemaking provisions—rather than the APA's—apply). *See also* 5 U.S.C. § 559 (providing that a "[s]ubsequent statute may not be held to supersede or modify [the APA], except to the extent that it does so expressly").

Agency Funding

Finally, and perhaps most significantly, Congress exercises virtually plenary control over agency funding.[114] This power to determine agency appropriations can be used to control agency priorities, prohibit agency action by denying funds for a specific action, or force agency action by either explicitly appropriating funds for a program or activity or withholding agency funding until Congress's wishes are complied with.[115]

Article I of the Constitution gives Congress the power to tax and spend in order to provide for the "Common Defence and general Welfare of the United States,"[116] and provides explicitly that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[117] Thus, Congress controls the funding levels for agency operations and programs through enactment of appropriations.[118] A typical appropriation measure contains limits on the amount of funding available to an entity and specifies the purposes and duration for which the funding can be used.[119] Agencies may neither spend appropriated funds in excess of an amount authorized, nor withhold appropriated funds from expenditure in a manner that violates the intent of the appropriation.[120] Moreover, several federal statutes, such as the Antideficiency Act, reinforce Congress's power of the purse by making it unlawful to spend in excess of appropriations.[121]

Along with the power to determine general funding levels for agencies and programs, Congress may also prohibit or condition the use of funds to control agency activity or achieve certain policy goals. Given the legislative branch's clear constitutional power over the purse,[122] the Supreme Court has recognized that "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."[123] These so-called "appropriations riders" are a common tool for guiding an agency, especially when Congress seeks to prevent an agency from acting. A typical rider prohibits an agency from using funds to implement a certain action and potentially can transform how a federal agency implements the law. For example,

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[114] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) ("[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress.").

[115] Congress has used restrictions on the payment of salaries to buttress its legislative prerogatives. *See, e.g.*, 5 U.S.C. § 5503(a) (prohibiting salary payments for certain recess appointments); Consolidated Appropriations Act, 2004, P.L. 108-199, div. F, tit. VI, § 618, 188 Stat. 3, 354 (2004) (prohibiting the use of funds to pay the salary of a federal official or employee who prevents another federal official or employee from communicating with Congress).

[116] U.S. CONST. art. I, § 8, cl. 1 (Taxing and Spending Clause).

[117] Id. § 9, cl. 7. For an overview of Congress's appropriations power, see CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean M. Stiff.

[118] For discussion about the relationship between the Taxing and Spending Clause and the Appropriation Clause, *see* CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by Andrew Nolan, at 15-17 (discussing the Taxing and Spending Clause as a source of legislative power to provide money for a particular project and the Appropriations Clause as a restriction on the power of federal entities to use money in a manner not authorized by Congress).

[119] U.S. GOV'T ACCOUNTABILITY OFF., OFF. OF THE GEN. COUNS., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-8 (4th ed. 2016).

[120] *See* Train v. City of New York, 420 U.S. 35, 42–49 (1975). Congress has granted agencies limited authority to defer or rescind funds under the Impoundment Control Act. 2 U.S.C. §§ 683–684.

[121] *See, e.g.*, 31 U.S.C. § 1341(a)(1)(A) (prohibiting federal employees from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation").

[122] *See* U.S. CONST. art. I, § 9, cl. 7.

[123] Lincoln v. Vigil, 508 U.S. 182, 192–93 (1993) (upholding the decision to discontinue the Indian Children's Program by the Indian Health Service, where funding for the program was provided in an annual lump sum appropriation to the agency).

Congress has used appropriations riders to limit agency action on issues ranging from the enforcement of federal marijuana laws to the transfer of detainees from the U.S. Naval Station at Guantanamo Bay.[124]

But while Congress's power of the purse is almost plenary, it cannot be used to achieve unconstitutional purposes.[125] For example, in *Lovett v. United States*, the Supreme Court held that Congress cannot wield its appropriations power to punish specific government officials in violation of the Bill of Attainder Clause.[126] The executive branch has consistently contended that Congress may not use its appropriations power to infringe upon the President's constitutional authority.[127]

Non-statutory Tools to Influence Executive Branch Agencies

The above discussion establishes Congress's broad authority to control federal agencies by enacting legislation. These statutory tools, however, may be exercised only under Congress's lawmaking power, which requires the participation and agreement of the House, Senate, and, absent a veto override, the President.[128] But there are also many non-statutory tools (i.e., tools not requiring legislative enactment to exercise) that may be used unilaterally and independently by the House, Senate, congressional committees, or individual Members of Congress to influence and control agency action.

Constitutional Limits on Non-statutory Legislative Actions

The Constitution's required lawmaking procedures impose significant limitations on how Congress and its component parts (i.e., the House, Senate, committees, and individual Members) may wield power over agencies. The Supreme Court has made clear that Congress must exercise its legislative power in compliance with the "finely wrought and exhaustively considered[] procedure"[129] set forth in Article I, Section 7, which provides that "every Bill which shall have

[124] *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, P.L. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (preventing the Department of Justice from using funds to "prevent" certain states "from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana"); Consolidated Appropriations Act of 2014, P.L. 113-76, div. C, tit. VIII, § 8111, 128 Stat. 5 (prohibiting the Department of Defense from "using appropriated funds to transfer any individuals detained at Guantanamo Bay unless the Secretary of Defense notifies certain congressional committees at least 30 days before the transfer").

[125] United States v. Klein, 80 U.S. (8 Wall.) 128 (1872) (holding invalid an appropriations proviso that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); United States v. Lovett, 328 U.S. 303, 316–18 (1946) (invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials). In addition, it would appear that the most prevalent restriction on the use of the appropriations power is self-imposed and stems from an internal House rule limiting the use of substantive legislative language in appropriations bills. HOUSE RULE XXI.

[126] *Lovett*, 328 U.S. at 316–18.

[127] *See* Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 266 (1996) ("Broad as the spending power of the legislative branch undoubtedly is,.... Congress may not use the spending power to infringe on the President's constitutional authority.").

[128] U.S. CONST. art. I, § 7. However, each chamber can wield unilateral power by refusing its consent to legislative measures.

[129] Immigration & Naturalization Servs. v. Chadha, 462 U.S. 919, 951 (1983).

passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."[130] This provision establishes the bedrock constitutional principle that before legislation is given the force and effect of statutory law, it must first satisfy the requirements of bicameralism (approval by both houses of Congress) and presentment (submission to the President for his signature or veto).[131]

Immigration & Naturalization Service v. Chadha is the seminal case on the limits bicameralism and presentment place on the ability of Congress's component parts to act alone.[132] In *Chadha*, the Court struck down a provision of the Immigration and Nationality Act (INA) that had authorized either house of Congress, by simple resolution, to "veto" an exercise of statutory deportation authority that had been delegated to the Attorney General.[133] In invalidating this "legislative veto," the Court determined that "legislative acts" having the force of law are subject to the requirements of bicameralism and presentment, and held that the INA's one-house veto procedure did not comply with these constitutional requirements.[134] The Court defined a legislative act as any action "properly ... regarded as legislative in its character and effect" or taken with "the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch."[135]

The *Chadha* opinion identified specific exceptions to the bicameralism and presentment requirement, noting that "[c]learly, when the [Constitution's] Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms."[136] The Constitution's impeachment provisions and those relating to Senate advice and consent to treaty ratification and the appointment of judges, ambassadors, and public officials are examples of such provisions.[137] The Court also noted that "[e]ach House has the power to act alone in determining specified internal matters."[138] These express exceptions to the bicameralism and presentment requirements in the Constitution, the Court noted, "further indicate[] the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances."[139]

As a result of the *Chadha* decision, if Congress seeks to legally compel or prohibit agency action, or otherwise alter an agency's underlying authority, the House and Senate generally must act in concert with each other, and absent a veto override, in concert with the President.[140] *Chadha*,

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[130] U.S. CONST. art. I, § 7.

[131] Clinton v. City of New York, 524 U.S. 417, 439–40 (1998) ("The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" (citing *Chadha*, 462 U.S. at 951)).

[132] *Chadha*, 462 U.S. at 944–59.

[133] *Id*. at 952–55.

[134] *Id*. at 952.

[135] *Id*.

[136] *Id*. at 955–56.

[137] *Id*. at 955.

[138] *Id*. at 955 n.21 (referencing U.S. CONST. art. I, § 5, cl. 2 and § 7, cls. 2, 3).

[139] *Id*.

[140] U.S. CONST. art. I, § 7. One exception is the subpoena, which can be issued by a single congressional committee and carries with it the legal obligation to respond. Watkins v. United States, 354 U.S. 178, 187–88 (noting the existence of an "unremitting obligation to respond to subpoenas").

therefore, represents a key limitation on the ability of an individual house, committee, or Member to directly and unilaterally control federal agencies.[141]

Yet a distinction must be made between Congress's authority to mandate or prohibit agency activity through the enactment of legislation, and the ability of Congress, legislative committees, and individual Members to influence agency conduct through the use of other tools. As discussed in the remainder of the report, there are many non-statutory tools that congressional actors may use to influence agencies without compliance with bicameralism and presentment. These tools may inhere to the House, Senate, congressional committees, or individual Members and can generally be used to either obtain information necessary for informed congressional involvement in administrative decisionmaking, or pressure an agency into pursuing a certain course of conduct by harnessing and focusing public attention on an agency's or an official's action or inaction.[142]

Significant Tools Available to Both the House and Senate[143]

Some of the most significant non-statutory tools are available to both houses of Congress. Three tools have particular practical or legal significance to Congress: expressions of disapproval, including censure; criminal contempt of Congress; and each house's inherent power to arrest and jail individuals for obstructive conduct.[144]

Censure and Other Expressions of Disapproval

Either house of Congress may seek to influence agency action through formal disapproval of executive branch officials. Formal declarations of disapproval take different forms. They can be expressions of censure or condemnation,[145] declarations of a loss of or no confidence in an official, or expressions of the belief that an official should resign or be removed from office.[146]

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[141] *See* Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam), *aff'd*, 463 U.S. 1216 (1983) (invalidating use of two-house veto through concurrent resolution); *Chadha*, 462 U.S. at 959 (Powell, J., concurring) ("The Court's decision, based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto."). The Supreme Court has consistently interpreted *Chadha* as limiting the legal impact of non-statutory legislative actions. For example, in *Bowsher v. Synar*, the Court reaffirmed that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." 478 U.S. 714, 733–34 (1986).

[142] *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. 489, 520 (2001) (writing that "[t]he Framers contemplated that Congress would participate in the administration of the laws in many ways, including confirmation of executive branch appointments and withholding funds").

[143] This overview is not exhaustive in terms of the universe of non-statutory tools available to Congress to influence and control administrative agencies. The tools included were selected due to their particular significance to Congress's oversight and investigative responsibilities.

[144] The House and Senate have also instituted civil proceedings to enforce compliance with valid congressional subpoenas. Because each house typically relies upon a different source of law to maintain civil enforcement lawsuits—that is, via a simple resolution (House) or civil enforcement statute (Senate)—each house's civil enforcement power is discussed in the respective sections covering the exclusive tools available to the House and to the Senate individually. *See infra* "Tools Available to the House" & "Tools Available to the Senate."

[145] Rather than targeting an individual, a resolution can condemn agency action generally. *See, e.g.*, H. Res. 271, 116th Cong. (2019) (describing "actions taken by the Trump Administration seeking the invalidation of the ACA's protections for people with pre-existing conditions" as "an unacceptable assault on the health care of the American people" and calling on the DOJ to reverse its litigating position in a specific case); H. RES. 644, 113th Cong. (2014) (condemning and disapproving "the failure of the Obama administration" to notify Congress of a prisoner exchange involving "five senior members of the Taliban from detention at ... Guantanamo Bay, Cuba").

[146] *See* CRS Report RL34037, *Congressional Censure and "No Confidence" Votes Regarding Public Officials*,

These expressions are generally contained in simple resolutions if issued by one house or concurrent resolutions if issued by Congress as a whole.[147] Although censure resolutions and other expressions of disapproval generally have no legal effect, they might still influence the actions of agency officials who wish to avoid the political consequences of such measures.[148]

Congress has proposed resolutions condemning or censuring executive branch officials since as early as 1793, when Congress considered resolutions censuring Secretary of the Treasury Alexander Hamilton.[149] As a matter of historical practice, censure and similar resolutions have been adopted against various executive officials.[150] Still, some have argued that congressional censure of executive officials is unconstitutional.[151] For example, it has been argued that the impeachment provisions of the Constitution provide the exclusive means by which Congress may punish executive branch officials, and that censure is an unconstitutional bill of attainder by imposing legislative punishment on a named official.[152] These arguments appear to be grounded in an understanding of the relationship between censure, impeachment, and bills of attainder that is not widely shared. Impeachment is exclusive only in that it is the sole tool available to Congress to *remove* an official from office and that Congress is constitutionally prohibited from imposing any additional punishment following impeachment and conviction beyond removal and disqualification from holding future federal office.[153] Censure and other expressions of disapprobation in simple or concurrent resolutions, however, do not seek to legally compel removal from office, nor are they punishments following impeachment and conviction.[154]

As for the Constitution's prohibition on bills of attainder, a censure resolution would violate that constitutional prohibition only if it imposed a "punishment" as envisioned by the Bill of Attainder Clause.[155] The Supreme Court has identified a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the

coordinated by Cynthia Brown, at 1, 8.

[147] Brown, *supra* note 146, at 5.

[148] *Cf.* Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 377 (1999) (describing censure as a tool for "collective[] ... condemnation").

[149] None of the resolutions passed. Brown, *supra* note 146, at 6 & n.20.

[150] *See, e.g.*, *id.* at 6–7 (discussing the House's condemnation of President Buchanan and his Secretary of the Navy in 1860 and the House and Senate's respective resolutions of disapprobation directed at Attorney General A.H. Garland in 1886 and Ambassador Thomas Bayard in 1896).

[151] *See* Gerhardt, *supra* note 148, at 376 (explaining that those who opposed censure over impeachment proceedings for President Clinton "claimed, *inter alia*, that [censure] constituted either a bill of attainder or an illegitimate bypass of the only constitutionally authorized means—impeachment—for dealing with a President's misconduct").

[152] For example, the House report underlying President Bill Clinton's impeachment argued that,

> for the President or any other civil officer, censure as a shaming punishment by the legislature is precluded by the Constitution, since the impeachment provisions permit Congress only to remove an officer of another branch of government and disqualify him from office. Not only would such a punishment undermine the separation of powers by punishing the President or other civil officers of the government in a manner other than expressly provided for in the Constitution, but it would violate the Constitution's prohibition on Bills of Attainder.

H.R. REP. NO. 105-830, at 137 (1998) (citing U.S. CONST. art. I, § 9, cl. 3). *See also* James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case Against Censure*, 24 HARV. J. L. & PUB. POL'Y 283, 290 (2000) (arguing that, "not only is there no textual defense for interbranch censure (at least not outside of the impeachment process), the Constitution expressly forbids it through its prohibition against bills of attainder").

[153] *See* U.S. CONST. art. I, § 3, cls. 6, 7; *id.* art. II, § 4.

[154] CRS Legal Sidebar LSB10096, *The Constitutionality of Censuring the President*, by Todd Garvey.

[155] U.S. CONST. art. I, § 9, cl. 3.

protections of a judicial trial."[156] The Court has explained that "the historical meaning of legislative punishment" includes "imprisonment, banishment, … the punitive confiscation of property[,].... [and] legislative bars to participation by individuals or groups in specific employments or professions."[157] A non-tangible injury—such as the reputational harm that might result from a censure resolution—is not the category of injury generally viewed as implicated by the Bill of Attainder Clause.[158] Given that censure resolutions do not carry a direct legal consequence, it would appear difficult to argue that such measures impose the type of punishment prohibited by the Clause.

Criminal Contempt of Congress

While expressions of disapproval through censure or similar mechanisms do not carry direct legal consequences, legal penalties potentially attach to an individual's refusal to comply with a valid congressional subpoena.[159] If an agency official (or any other individual) refuses to appear before a committee to provide testimony or produce documents in response to a congressional subpoena, the relevant house of Congress may seek to punish the witness for failure to comply with the subpoena by certifying the case to a United States Attorney for criminal prosecution in federal court.[160] Generally speaking, the threat of such a referral can encourage agency compliance with congressional oversight requests.[161]

Under federal statute, a person "summoned as a witness" to provide testimony or produce documents upon the request of either house of Congress and who is found to have "willfully" refused to provide "pertinent" documents or testimony is guilty of a misdemeanor and may be subject to a fine and imprisonment.[162] Under both federal law and House and Senate practice, if

[156] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977); *see* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867) (declaring that "[a] bill of attainder is a legislative act which inflicts punishment without a judicial trial").

[157] Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 852 (1984) (citing *Nixon*, 433 U.S. at 473–74).

[158] A court's "inquiry is not ended by the determination that [a bill] imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause." *Nixon*, 433 U.S. at 475. The Supreme Court "recognize[s] [two other] necessary inquiries": "whether the [bill in question], viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes" and "whether the legislative record evinces a congressional intent to punish." *Selective Serv. Sys.*, 468 U.S. at 852 (internal quotation marks and citation omitted). If a legitimate, nonpunitive reason for a censure resolution is articulated by one or both houses—such as to ensure that Congress's position is known or to dissuade the official to whom the resolution is directed from engaging in similar conduct in the future—then the resolution likely would not qualify as a bill of attainder. *Cf. Nixon*, 433 U.S. at 476 ("Where [nonpunitive] legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.").

[159] *See* 2 U.S.C. § 192.

[160] For a comprehensive examination of congressional contempt and enforcement of congressional subpoenas, see CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey [hereinafter Garvey, *Congress's Contempt Power*].

[161] *See, e.g.*, H.R. REP. NO. 104-849, at 9 (1996) (explaining that the White House delivered one thousand documents in connection with the investigation into the White House's dismissal of members of the White House Travel Office staff on the same day the House was scheduled to vote on a contempt resolution regarding White House Counsel John Michael Quinn); *see also* Mary Clare Jalonick, *Justice Department Gives Congress New Classified Documents on Russia Probe*, CHI. TRIB., June 23, 2018 (reporting that the Department of Justice provided Congress with classified information after "lawmakers had threatened to hold officials in contempt of Congress").

[162] 2 U.S.C. § 192. Although Section 192 actually states that violations are punishable by a fine of up to $1,000, the maximum fine for contempt under the statute was increased to $100,000 due to Congress's subsequent classification of offenses. *See* 18 U.S.C. § 3559(6) ("An offense that is not specifically classified by a letter grade in the section defining it" is a Class A misdemeanor "if the maximum term of imprisonment authorized is ... one year or less but more than six months"); *id.* § 3571(b) (A person found guilty of "a Class A misdemeanor that does not result in death" may be fined

the House or Senate approves a criminal contempt citation, a report shall be certified "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."[163]

There are several legal limitations on Congress's use of the criminal contempt statute. Like other criminal provisions, the criminal contempt of Congress statute cannot be used to prosecute constitutionally protected conduct.[164] In addition, the subpoena that forms the basis for the criminal contempt statute must be valid.[165] In general, this means the subpoena must seek information relevant to an investigation that is both within the issuing committee's jurisdiction and for which the committee can articulate a legislative purpose.[166] These subpoena-related limitations are detailed later in this report in reference to the use of subpoenas by congressional committees.[167]

There are additional limits on the use of the criminal contempt statute that arise from the manner in which the criminal contempt of Congress provision is enforced. The executive branch has taken the position—based on both statutory interpretation and the constitutional separation of powers—that federal prosecutors retain discretion in deciding whether to begin a criminal contempt of Congress prosecution.[168] That discretion, it has been asserted, extends to the decision to present the matter to a grand jury.[169] The executive branch has also asserted that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege."[170] As a result, there have been recent instances in which use of the criminal contempt of Congress provision against an agency official has proven unavailing.[171] For example, when the President directs or

no more than $100,000); *see also id.* § 3571(e) (If a statute imposes no fine or one that is lower than that authorized by Section 3571 and "exempts the offense from the applicability of the fine otherwise applicable" thereunder, the fine or lack thereof set forth in the specific statute controls.).

[163] 2 U.S.C. § 194. *See also Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that Was Voted by the Full House of Representatives against the Then-Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearing Before the H. Comm. on Pub. Works and Transp.*, 98th Cong., at 30 (1983).

[164] *See e.g.*, Watkins v. United States, 354 U.S. 178, 215 (1957) (Fifth Amendment due process); Quinn v. United States, 349 U.S. 155, 161–65 (1955) (Fifth Amendment privilege against self-incrimination); Barenblatt v. United States, 360 U.S. 109, 125–34 (1959) (First Amendment).

[165] 2 U.S.C. § 192.

[166] *See, e.g.*, Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 20–21 (D.D.C. 1994) (holding that courts "may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties,'" (quoting McPhaul v. United States, 364 U.S. 372, 381 (1960) (alterations in original)).

[167] *See infra* "Committee Investigative Oversight."

[168] *See, e.g.*, Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 102 (1984) (asserting that the criminal contempt statute cannot be interpreted as imposing a legal obligation on the executive branch).

[169] *See, e.g.*, Letter from Ronald C. Machen, Jr., United States Att'y, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015) (declining to present criminal contempt citation to a grand jury).

[170] *Prosecution for Contempt*, 8 Op. O.L.C. at 102. Specifically, the Office of Legal Counsel has asserted that interpreting 2 U.S.C. § 194 as requiring the executive branch to initiate a criminal contempt prosecution under these circumstances would "burden" and "nullif[y]" the President's exercise of executive privilege and impermissibly interfere with the "prosecutorial discretion of the Executive by directing the executive branch to prosecute particular individuals." *Id.* at 115.

[171] The last such instance occurred in 2019 when the House approved a criminal contempt resolution against Attorney General William Barr and Secretary of Commerce Wilbur Ross. H. Res 497, 116th Cong. (2019). The DOJ informed

endorses non-compliance with a subpoena, such as where the official refuses to disclose information pursuant to the President's decision that the information is protected by executive privilege, past practice suggests that the Department of Justice (DOJ) is unlikely to pursue a prosecution for criminal contempt.[172] Even when the official is not acting at the direction of the President, the executive branch has argued that in deciding whether to pursue the case it retains authority to make an independent assessment of whether the official has violated the criminal contempt statute.[173]

Inherent Contempt

The inherent contempt power is a constitutionally based power given to each house to arrest and detain an individual found to be "obstruct[ing] the performance of the duties of the legislature."[174] Because the power extends to conduct that generally obstructs the exercise of legislative powers by either the House or the Senate, the inherent contempt power can be more broadly applied than the criminal contempt statute.[175] Despite its title, "inherent" contempt should perhaps more accurately be characterized as an implied constitutional power.[176] The Supreme Court has repeatedly held that although the contempt power is not specifically granted by the Constitution, it is nonetheless "incidental" to the legislative function and therefore implied from the general vesting of legislative powers in Congress.[177]

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the House it would not take action on the contempt resolution, reasoning that the Department "will not prosecute an official for contempt of Congress for declining to provide information subject to a presidential assertion of executive privilege." *See* Andrew Desidierio, *DOJ Won't Charge William Barr, Wilbur Ross After Contempt Vote*, POLITICO (July 24, 2019, 5:50PM), https://www.politico.com/story/2019/07/24/justice-william-barr-wilbur-ross-1432595.). For a discussion of other times the DOJ has refused to take action on criminal contempt of congress resolutions *see* CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey.

[172] *See* Letter from James M. Cole, Deputy Att'y Gen'l, U.S. Dep't of Justice, to John Boehner, Speaker of the House (June 28, 2012); *Prosecution for Contempt*, 8 Op. O.L.C. at 102.

[173] *See* Letter from Ronald C. Machen, Jr., United States Att'y, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

[174] Jurney v. MacCracken, 294 U.S. 125, 147–48 (1935). The action that forms the basis for contempt must threaten the ability of "the respective bodies to discharge their legitimate functions." *In re* Chapman, 166 U.S. 661, 671 (1897) (internal quotation marks omitted).

[175] *See* J. Richard Broughton, *Congressional Law Enforcement*, 64 WAYNE L. REV. 95, 122 (2018) (opining that "the inherent contempt remedy is available for conduct that offends the prerogatives or integrity of the legislative body broadly, beyond what would be prosecutable merely pursuant to the criminal contempt statute"). Like criminal contempt, however, DOJ has asserted that Congress's inherent contempt power cannot be used against "an executive official who asserted a Presidential claim of executive privilege." *Prosecution for Contempt*, 8 Op. O.L.C. at 140 n.42; *see also* Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 86 (1986) (opining that "the same considerations that inform the analysis of the applicability of [2 U.S.C.] §§ 192 and 194 to Executive Branch officials are relevant to an exercise of Congress' inherent contempt power").

[176] The contempt power is an implied aspect of the legislative power. Marshall v. Gordon, 243 U.S. 521, 537 (1917) (noting that "it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties."). As opposed to an inherent power, which is not tethered to a textual grant of authority, an implied power is derived by implication from an enumerated power. *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 42–43 (2001).

[177] U.S. CONST. art. I, § 1. *See generally* Nixon v. Adm'r of Gen. Servs., 433 U.S. 435 (1977); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957); McGrain v. Daugherty, 273 U.S. 135, 174 (1927); *see also* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) ("[T]here can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of

In an inherent contempt proceeding, the House or Senate can authorize the arrest of a suspected contemnor by the body's Sergeant at Arms.[178] If the individual is found in contempt, the body (either the House or the Senate) is empowered to imprison or otherwise detain the individual until he or she complies with the congressional request or until the end of the legislative session.[179] Despite its potential reach, the inherent contempt power has been described by some observers as cumbersome, inefficient, and "unseemly."[180] Presumably for these reasons, neither house of Congress has initiated an inherent contempt proceeding since 1935.[181]

Tools Available to the House

Several non-statutory tools inhere exclusively to the House of Representatives. Some of these tools have limited legal effect. For example, through resolutions of inquiry, the House may make non-binding requests for information from certain executive branch officials. Other non-statutory tools have weighty and, potentially, legally consequential effects. The House may impeach federal government officials for "high Crimes and Misdemeanors."[182] Moreover, it may initiate certain types of civil actions in federal court, including to enforce compliance with congressional

such subpoenas.").

[178] *See* Thomas L. Shriner, Jr., Note, *Legislative Contempt and Due Process: The* Groppi Cases, 46 IND. L.J. 480. 490–91 (1971). Historical evidence suggests "that the inherent contempt process can be supported and facilitated by the conduct of evidentiary proceedings and the development of recommendations at the committee level." Garvey, *Congress's Contempt Power*, *supra* note 160, at 13.

[179] *Watkins*, 354 U.S. at 207 n.45. Arguably, Congress could jail or detain contemnors in facilities operated by the Metropolitan Police Department of the District of Columbia, as Congress has plenary authority over the District of Columbia. *See* Garvey, *Congress's Contempt Power*, *supra* note 160, at 10 n.79 (citing U.S. CONST. art. I, § 8). There is a question as to whether the Senate must release a contemnor from custody before the end of the legislative session, as, unlike the House of Representatives—whose seats are up for election every two years—the Senate—which holds elections for only one-third of its membership every two years—is considered to be a "continuing body." *Id.* at 8 & n.61.

[180] *See* Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 254 (writing that "[t]here is something unseemly about a House of Congress getting into the business of trial and punishment"); S. REP. NO. 95-170, at 97 (1977) (describing Congress's inherent contempt, which requires a trial in the House or the Senate, as "time consuming and not very effective"). Congress has arrested two executive branch officials in the exercise of its inherent contempt power. In 1879, the House of Representatives's Sergeant at Arms arrested and brought before the bar of the House George F. Seward, United States Minister to China. The House ordered Seward's arrest due to his refusal to produce or testify about books in his possession that allegedly contained evidence that he had stolen money from the Shanghai consulate while serving as Consul General there. Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1135–37 (2009). And in 1916, the House's Sergeant at Arms arrested H. Snowden Marshall, United States District Attorney for the Southern District of New York, after Marshall wrote and publicly disclosed a "defamatory and insulting" letter directed to the House subcommittee investigating him for misconduct. *Id.* at 1137–38 (quoting Marshall v. Gordon, 243 U.S. 521, 532 (1917)) (internal quotation marks omitted). The Supreme Court later ordered Marshall's release, holding that his letter "was not intrinsic to the right of the House to preserve the means of discharging its legislative duties" and, therefore, was outside the scope of the inherent contempt power. *Marshall*, 243 U.S. at 546, 548.

[181] Garvey, *Congress's Contempt Power*, *supra* note 160, at 12 (writing that, because of its drawbacks (e.g., inefficiency and unseemliness), "the inherent contempt process has not been used by either [house of Congress] since 1935") (citing 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15, § 17, at 139 n.7 (1977)). H.R. Res. 1029, introduced in the 116th Congress, would have amended House rules to create a process by which the inherent contempt power could be used to impose fines on those that refuse to comply with a committee subpoena.

[182] U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives ... shall have the sole Power of Impeachment."); *id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

subpoenas.[183] (The Senate's role in the impeachment process and its ability to enforce congressional subpoenas through civil litigation is covered separately in this report.[184])

Resolutions of Inquiry

Under House Rule XIII, the House may request certain information from executive branch officials through resolutions of inquiry.[185] Resolutions of inquiry are simple resolutions that seek factual information in the possession of the executive branch. They are limited in their effect, however, given that they are neither legally binding on the agency nor judicially enforceable; instead, "[t]he effectiveness of such a resolution derives from comity between the branches of government rather than from any elements of compulsion."[186] Resolutions of inquiry are given privileged status on the House floor if they are directed toward the head of a department[187] and seek available facts, rather than opinions.[188]

Resolutions of inquiry are most typically used to request documents or information that pertains to foreign affairs, defense, or intelligence matters.[189] They traditionally "request" information from the President, while other officials are usually "directed" to provide the sought-after information.[190] Although resolutions of inquiry are not legally enforceable, they are often phrased in mandatory terms when directed to persons other than the President.

Impeachment

The Constitution establishes a bifurcated process for impeachment and removal, with the House of Representatives accorded the "sole Power" to impeach federal government officials,[191] and the Senate given "the sole Power to try all Impeachments,"[192] with the immediate consequence of

[183] *See, e.g.*, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 64 (D.D.C. 2008) (holding that the court had jurisdiction to hear action to enforce congressional subpoenas because Congress's "subpoena power derives implicitly from Article I of the Constitution"). The Senate's role in the impeachment process and its ability to enforce congressional subpoenas through civil litigation are covered separately in this report.

[184] *See infra* "Tools Available to the Senate."

[185] HOUSE RULE XIII, cl. 7. While the Senate is not prohibited from passing resolutions of inquiry, modern Senate parliamentary practice does not provide for their use. The tool was last used by the Senate in 1926. *See* CRS Report R40879, *Resolutions of Inquiry: An Analysis of Their Use in the House, 1947-2017*, by Christopher M. Davis, at 1 n.2 (noting that resolutions of inquiry are not common in the Senate, and that one was last used by that body in 1926) [hereinafter Davis, *Resolutions of Inquiry*] (citing RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES 799, 1205 (1992)).

[186] 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, at ch. 15, § 2, at 2304 (2d ed. 1994) [hereinafter 4 DESCHLER'S PRECEDENTS].

[187] HOUSE RULE XIII, cl. 7; *see* CHARLES W. JOHNSON ET AL., HOUSE PRACTICE, ch. 49, § 4, at 847 (2017); Davis, *Resolutions of Inquiry*, *supra* note 185, at 6.

[188] JOHNSON ET AL., *supra* note 187, at Ch. 49, § 4, 847.

[189] *See, e.g.*, H.R. Res. 243, 116th Cong. (2019); CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Todd Garvey, and Ben Wilhelm [hereinafter Davis et al., *Congressional Oversight Manual*] at 81-2; Davis, *Resolutions of Inquiry*, *supra* note 185, at 4.

[190] 4 DESCHLER'S PRECEDENTS, *supra* note 186, at ch. 15, § 2, 2304. *See, e.g.*, H.R. Res. 80, 104th Cong. (1995) (requesting that the President supply the House with documents pertaining to the Mexican economy "if not inconsistent with the public interest"). On June 28, 2018, the House agreed to a resolution "insist[ing] that ... the Department of Justice fully comply with" subpoenas and other requests of the House Permanent Select Committee and Committee on the Judiciary concerning "potential violations of the Foreign Intelligence Surveillance Act by personnel of the Department of Justice and related matters." H.R. Res. 970, 115th Cong. (2018).

[191] U.S. CONST. art. I, § 2, cl. 5.

[192] *Id.* § 3, cl. 6.

Senate conviction being an official's removal from office.[193] (The Senate's power to try impeachments is discussed below.[194]) The purpose underlying the impeachment process "is not punishment; rather, its function is primarily to maintain constitutional government."[195]

The Constitution defines who may be impeached and stipulates the types of misconduct that rise to the level of impeachable offenses. First, Article II, Section 4 permits only the impeachment of "[t]he President, Vice President and all civil Officers of the United States."[196] While the Constitution does not define the term "civil Officers," past practice signifies that Congress understands the term to embrace federal judges and Cabinet-level executive branch officials.[197] Congress has never impeached a non-Cabinet level official in the executive branch, so there is some question whether such officials are "civil Officers."[198] While untested, non-officer employees of the federal government (i.e., most individuals employed in the federal bureaucracy who are not subject to appointment by the President or departmental heads) probably are not

[193] *Id*. art. II, § 4.

[194] *See infra* "The Senate's Role in Impeachment: Trial and Removal."

[195] WM. HOLMES BROWN ET AL., A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE, ch. 27, § 1, at 591 (2011).

[196] *Id*. art. II, § 4.

[197] *See* BROWN ET AL., *supra* note 195, at ch. 27, § 2, 593.

[198] In determining who is a "civil Officer of the United States," it is sometimes helpful to draw from Appointments Clause jurisprudence. *See* CRS Report R44260, *Impeachment and Removal*, by Jared P. Cole and Todd Garvey, at 5. As discussed above, *see supra* "Limitations Imposed by the Appointments Clause," the Appointments Clause establishes the methods for appointing "Officers of the United States," U.S. CONST. art. II, § 2, cl. 2. It is likely that principal "Officers of the United States"—those who must be appointed by the President with the advice and consent of the Senate and who are generally subject only to the President's supervision—are impeachable, whether or not they occupy a Cabinet-level position. "[I]nferior Officers"—those "Officers of the United States" whose appointments Congress may vest in the President alone, a department head, or "the Courts of Law," U.S. CONST. art. II, § 2, cl. 3, and who are generally subject to supervision by principal officers, Edmond v. United States, 520 U.S. 651, 663 (1997)—may also qualify as "civil Officers of the United States." *Cf.* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 790 (1833) (opining that "*all* officers of the United states [] who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment") (emphasis added). However, this proposition is far from certain, and some historical evidence may suggest the contrary. *See, e.g.*, Statement of Archibald Maclaine, North Carolina Convention on the Adoption of the U.S. Constitution, *cited in* Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1510 (1970) (remarking that "[i]t appears to me ... the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offense.... I hope every gentleman ... must see plainly that impeachments cannot extend to inferior officers of the United States"). For more information on who is subject to impeachment, see Cole & Garvey, *supra*, at 3-7.

subject to impeachment.[199] Nor have Members of Congress[200] or military officers[201] been considered "civil Officers of the United States" under Article II, Section 4.

Second, the Constitution specifies the types of behavior that justify impeachment. A "civil Officer" is not subject to impeachment (and removal) unless the officer has committed "Treason, Bribery, or other high Crimes and Misdemeanors."[202] Treason and bribery are well-defined actions,[203] but there is no definition of "high Crimes and Misdemeanors" in the Constitution or statute. Congress has afforded the term a broad reading. For example, the House has described "high Crimes and Misdemeanors" as embracing "misconduct that damages the state and the operations of government institutions."[204] While grounds for impeachment "do not all fit neatly and logically into categories,"[205] there are at least three general categories of conduct that, based on past congressional practice, are thought to constitute grounds for impeachment:[206] (1) exceeding or abusing the powers of office;[207] (2) behavior incompatible with the functions and purpose of office;[208] and (3) misuse of office for improper purpose or for personal gain.[209]

While a powerful tool to influence executive branch action—and one that requires only a simple majority voting in favor—decisions by the House to impeach executive officials have been rare. In total, only three Presidents and one member of the Cabinet have been impeached by the House.[210] None of those officials were convicted in the Senate.

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[199] The Supreme Court, in interpreting the Appointments Clause, has distinguished between officers (both principal and inferior), who exercise "significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), and employees, or non-officers who are "lesser functionaries subordinate to the officers of the United States," *id.* at 126 n.162. *See supra* "Limitations Imposed by the Appointments Clause." Assuming, just as the previous footnote does, that Appointments Clause jurisprudence serves as a guide in deciding who is a civil officer subject to impeachment, it would appear that "employees," as non-officers, are not subject to impeachment.

[200] While the House did impeach Senator William Blount in 1797, the Senate ultimately determined that it lacked jurisdiction to try him. BROWN ET AL., *supra* note 195, at ch. 27, § 4, 596. Blount's impeachment stemmed from his plan "to launch a military expedition that would wrest Florida and Louisiana from Spain and deliver it to England at a time when both were at war and the United States was neutral." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 214 (1973). The House has never again voted to impeach a Member of Congress; accordingly, the Blount impeachment appears to stand for the proposition that Members of Congress are not "civil Officers of the United States" subject to impeachment. CURRIE, *supra* note 14, at 281.

[201] BROWN ET AL., *supra* note 195, at ch. 27, § 2, 592.

[202] U.S. CONST. art. II, § 4.

[203] *See id.* art. III, § 3, cl. 1 (treason); 18 U.S.C. §§ 201 (bribery of public officials and witnesses), 2381 (treason).

[204] H.R. REP. NO. 100-810, at 6 (1988).

[205] *See* STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 21 (Comm. Print 1974) [hereinafter CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT].

[206] *Id.* at 18.

[207] For example, President Andrew Johnson was impeached in 1868 for, among other things, removing Secretary of War Edwin Stanton from office in violation of the Tenure of Office Act, which prohibited the President from removing Members of his Cabinet without Senate approval. *Id.* Such removal restrictions were later declared unconstitutional by the Supreme Court in *Myers v. United States*. 272 U.S. 52 (1926); *see supra* "Limitations Imposed by Principles of Presidential Control."

[208] Judge John Pickering's impeachment is an example of this category. Judge Pickering was impeached in 1803 for, among other things, "appearing on the bench during [a] trial in a state of intoxication and using profane language." BROWN ET AL., *supra* note 195, at ch. 27, § 4, 597.

[209] *See infra* note 210 (discussing Secretary of War William Belknap's impeachment in 1876 for appointing a trader to a position at a military post in return for payment.)

[210] Andrew Johnson, William Clinton, and Donald Trump have been the only Presidents to be impeached. William W. Belknap, Secretary of War under President Ulysses S. Grant, was the only Cabinet member to be impeached. In 1876, the House impeached Belknap for accepting payments in return for granting an appointment to a trading post. *See*

House Lawsuits

The House has also used the federal courts as a way to direct agency action.[211] That said, because of standing and other justiciability issues, the House's use of the courts as a conduit for controlling agencies appears principally related to subpoena enforcement, and possibly a limited class of executive expenditures, rather than to broader disagreements over the Executive's implementation of the law.[212]

As a threshold matter, House subpoena enforcement lawsuits generally must be authorized in one form or another.[213] That authorization has often been provided through a simple House resolution granting the committee that issued the subpoena the authority to seek a court order declaring that the subpoena recipient is legally required to comply with the demand for information.[214] However, the House has authorized subpoena enforcement suits in other ways, including through the Bipartisan Legal Advocacy Group.[215]

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, *supra* note 205, at 20. Belknap retired two hours before he was impeached. Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 53 (1999). After a five-month trial, the Senate voted to acquit the former Secretary of War. 3 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2444–2468, at 902–947 (1907); Turley, *supra*, at 54.

[211] For a more thorough discussion of Congress's ability to participate in litigation see CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Kevin M. Lewis.

[212] *See, e.g.*, Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (holding that the House has standing to seek judicial enforcement of its subpoenas); Comm. *See, e.g.*, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) (exercising jurisdiction over a civil suit filed by a House committee and ordering compliance with the committee subpoena); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 65–99 (D.D.C. 2008) (same). *But see* U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 58 (D.D.C. 2015) (exercising jurisdiction over a civil suit filed by the House of Representatives to enforce a violation of the Appropriations Clause). The D.C. Circuit has been wrestling with the House's authority to judicially enforce its subpoenas in the pending case of *Committee on the Judiciary v. McGahn*. In *McGahn*, the House initiated a suit to enforce a committee subpoena for testimony from former White House Counsel Don McGahn. A three-judge panel initially dismissed the case. Breaking from prior district court decisions, the circuit panel held that the judiciary "lack[ed] authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity 'beyond the [Federal] Government.'" Comm. on the Judiciary of the United States House of Representatives v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020). That opinion, however, was reversed by an en banc panel of the D.C. Circuit, which held that neither separation of powers considerations nor principles of standing barred the courts from hearing the House's lawsuit. 968 F.3d 755, 760-61 (D.C. Cir. 2020). On remand, however, the three-judge panel again rejected the House's lawsuit, this time holding that the House lacked a cause of action. 973 F.3d 121, 123 (D.C. Cir. 2020). That opinion has been vacated and is pending appeal back to the en banc D.C. Circuit. No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020). On May 11, 2021, the parties announced that they had reached an "agreement in principle on an accommodation" and will ask the circuit court to remove the case from the oral argument calendar. Joint Status Report at 1, Comm. on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. May, 5, 2021).

[213] *See McGahn*, 968 F.3d at 775-77; *Holder*, 979 F. Supp. 2d at 17; *Miers*, 558 F. Supp. 2d at 64. *See also* Lewis, *supra* note 211 at 24 ("Courts have routinely concluded that congressional plaintiffs who obtain authorization to sue before initiating litigation are significantly more likely to have standing."). One court has described the presence of authorization as a "key factor" in determining whether a congressional plaintiff has standing to assert an institutional injury. *Miers*, 558 F. Supp. 2d at 71. In *Raines v. Byrd*, the Supreme Court severely limited the ability of individual Member to use lawsuits to challenge agency action absent authorization from their parent body. 521 U.S. 811, 829–30 (1997). *See infra* "Tools for Individual Members."

[214] *See, e.g.*, H.R. Res. 706, 112th Cong. (2012); H.R. Res. 980 110th Cong. (2008).

[215] *See* H.R. Res. 430, 116th Cong. (2019) (resolving that "the chair of each standing and permanent select committee, when authorized by the Bipartisan Legal Advisory Group, retains the ability to initiate or intervene in any judicial proceeding before a Federal court on behalf of such committee, to seek declaratory judgments and any and all ancillary relief, including injunctive relief, affirming the duty of the recipient of any subpoena duly issued by that committee to comply with that subpoena").

Civil enforcement cases brought by an authorized committee, especially if triggered by an agency official's refusal to produce documents or testimony, generally require a court to evaluate both Congress's oversight powers and the official's articulated justification for non-compliance with the subpoena.[216] This typically will include an evaluation of whether the subpoena was validly issued and whether the witness has asserted a defense—such as a constitutionally based right or privilege—that would excuse compliance with the subpoena.[217] If the lawsuit succeeds, the court will generally order compliance with the subpoena and disclosure of the information. For example, in 2016, the D.C. federal district court issued an opinion in *Committee on Oversight and Government Reform v. Lynch* instructing DOJ to comply with a House committee subpoena.[218]

In addition to subpoena enforcement lawsuits, a federal district court has held that the House has standing to challenge expenditures of funds made without an appropriation from Congress.[219] In *United States House of Representatives v. Burwell*, the district court held that if an agency's expenditure of funds is taken in violation of the "specific proscription" in Article I that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," then the House has standing to remedy that constitutional violation.[220] However, that same opinion also held that the House does not suffer an injury adequate to obtain standing when it challenges an agency's "implementation, interpretation, or execution" of the law.[221]

Tools Available to the Senate

Some oversight tools are available exclusively to the Senate. Through its "advice and consent" responsibility, the Senate plays an integral role in the performance of two constitutionally prescribed executive functions—the appointment of important government officials and completion of treaties between the United States and foreign nations or international bodies.[222] In addition, if an official is impeached by the House, the Senate has the exclusive power to try and, upon conviction, remove the official from office.[223] And like the House, the Senate may seek to enforce congressional subpoenas through civil actions in federal court, but unlike the House, the Senate practice is authorized and shaped by federal statute.

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[216] *See Miers*, 558 F. Supp. 2d at 56 (noting that a court must stand "ready to fulfill the essential judicial role to 'say what the law is' on specific assertions of [] privilege that may be presented").

[217] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (focusing on the "sufficiency of the Committee's showing of need"); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016) (focusing on the various privileges asserted by the agency).

[218] *Lynch*, 156 F. Supp. 3d at 104, 107 (holding that the agency's arguments for confidentiality must yield to the committee's need for the information).

[219] United States House of Representatives v. Burwell, 130 F. Supp. 3d 53, 58 (D.D.C. 2015). Although the court's holding does not explicitly apply to the Senate, the court's reasoning potentially could extend to lawsuits authorized by that body, given the court's characterization of any injury stemming from an Appropriations Clause violation being "arguably suffered by the House and Senate alike," as they each share in the power of the purse. *Id.* at 71 n.21.

[220] *Id.*; U.S. CONST. art. I, § 9, cl. 7.

[221] *Burwell*, 130 F. Supp. 3d at 58. After finding that the House had standing, *id.* at 81, the district court held that the agency in question had, in fact, spent funds without an authorization of appropriations, United States House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016), *appeal dismissed*, United States House of Representatives v. Azar, No. 16-5202 (D.C. Cir. May 16, 2018) (per curiam) (dismissing appeal and remanding case to the district court for a ruling on parties' motion for relief under Federal Rule of Civil Procedure 60(b) (Grounds for Relief from a Final Judgment, Order, or Proceeding)).

[222] U.S. CONST. art. II, § 2, cl. 2.

[223] *Id.* art. I, § 3, cl. 6.

Senate Civil Enforcement of Subpoenas

Like the House, the Senate may seek to enforce a subpoena by instituting civil proceedings in federal court. While the House's civil enforcement of subpoenas may occur on an ad hoc basis, a federal statute provides procedures for subpoena enforcement by the Senate.[224] That statute is severely limited with regard to its application against an agency official. By statute, the U.S. District Court for the District of Columbia is granted jurisdiction to hear claims "to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subp[o]ena or order issued by the Senate or committee or subcommittee" thereof.[225] Filing such a lawsuit requires authorization from the Senate as a whole.[226] The Senate provision, however, does not apply to federal officials or employees who refuse to comply with a subpoena based on an assertion of a properly authorized governmental privilege.[227] Despite the limiting terms of the statute, it would appear arguable that, the Senate may retain the authority to seek enforcement of a subpoena on an ad hoc basis through approval of a Senate resolution authorizing such a lawsuit.[228]

Advice and Consent: Nominations and Treaties

The Constitution conditions the full performance of two essential executive branch functions on the assent of the Senate. The Appointments Clause and the Treaty Clause respectively authorize the President to make certain appointments to important governmental positions and to finalize treaties with foreign nations or international bodies on behalf of the United States only after receiving the "advice and consent" of the Senate.[229] "Advice and consent" in both contexts has been understood in practice to require senatorial approval, but not necessarily consultation.[230]

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[224] Ethics in Government Act, P.L. 95-521, §§ 703, 705, 92 Stat. 1877–80 (1978) (codified at 2 U.S.C. §§ 288b(b), 288d; 28 U.S.C. § 1365).

[225] 28 U.S.C. § 1365(a). The Senate may designate any attorney to represent it in such proceedings, *id.* § 1365(d), but civil actions are generally brought by the Senate Legal Counsel. *See* 2 U.S.C. § 288b(b). Like subpoena enforcement lawsuits filed by the House, a reviewing court would likely have to assess the validity of a Senate-issued subpoena and balance Congress's interest in obtaining the information sought with the agency official's justification for non-compliance.

[226] 2 U.S.C. § 288b. *See, e.g.*, S. Res. 377, 114th Cong. (2016) (authorizing a subpoena enforcement action).

[227] 28 U.S.C. § 1365(a) ("This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government.").

[228] *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 631 n.377 (noting that there is "some doubt" as to the limitations worked by the Senate statute). In a 2013 decision regarding a House subpoena, the U.S. District Court for the District of Columbia noted that the Senate statute "specifically states that it does not have anything to do with cases involving a legislative effort to enforce a subpoena against an official of the executive branch withholding records on the grounds of a governmental privilege." Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 18 (D.D.C. 2013). As such, the court suggested that it could look to the general federal question statute for jurisdiction. *Id.* (citing 28 U.S.C. § 1331, which provides that "[t]he [U.S.] district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). *But see* Comm. on the Judiciary v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020) *vacated by* Comm. on the Judiciary of the United States House of Representatives v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 32573, at *6 (D.C. Cir. Oct. 15, 2020) (suggesting that "the Senate statute expressly excludes suits that involve executive-branch assertions of 'governmental privilege'").

[229] U.S. CONST. art. II, § 2, cl. 2.

[230] While the Framers may have intended for the Senate to serve in a consultative role during treaty negotiations (as

Both Clauses, therefore, afford the Senate unique opportunities to influence and exert control over the execution of important executive branch powers, especially by conditioning or withholding consent in order to obtain executive branch compliance with congressional desires.

As noted, the Appointments Clause establishes that principal "Officers of the United States," and those "inferior Officers" whose appointments have not been vested in the President alone, department heads, or "the Courts of Law," must be appointed by the President with the advice and consent of the Senate.[231] Because of recent changes in Senate rules, presidential nominations are not subject to filibuster, and so as a practical matter, the support of a simple majority of Senators is enough to confirm a presidential nomination.[232] There are more than 1,200 executive branch positions that, by law, require Senate approval.[233] When an officer holding an advice-and-consent position leaves office before his or her successor is chosen, an acting official may temporarily perform the duties of the vacant office without receiving senatorial approval. The ability of government officials to perform the duties of a vacant office is generally governed by the Federal Vacancies Reform Act of 1998 (Vacancies Act),[234] although other statutes may supplement or supersede that statute.[235]

The Senate's advice-and-consent function under the Appointments Clause serves as a significant check on the executive branch, one which the Senate may use not only to approve or reject presidential nominees, but also to influence who is nominated for certain important offices and what a nominee will do in office if confirmed. For example, the threat that a simple majority of Senators will block a presidential nominee can be used by the Senate to persuade the President to nominate an individual agreeable to most Senators.[236] In addition, during the confirmation

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opposed to merely supplying or withholding its consent once negotiations had completed), the Senate has not served in such a capacity since the early days of George Washington's presidency. *See* CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan, at 3–4 (explaining that "advice and consent" may have been "intended ... to be separate aspects of the treaty-making process," but that President Washington and subsequent Presidents "soon declined to seek the Senate's input during the [treaty] negotiation process"). *See also* Beermann, *supra* note 74, at 110 (writing that, in the context of presidential appointments, "[a]dvice and consent is understood as majority approval in the Senate"); Howard R. Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treaty Making*, 18 MICH. J. INT'L L. 445, 446 (1997) (writing that '"[a]dvice and consent' [in relation to the President's treaty-making power] has come to mean [approval of] 'ratification'").

[231] U.S. CONST. art. II, § 2, cl. 2.

[232] Beermann, *supra* note 74, at 110.

[233] CRS Report R41872, Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress, by Maeve P. Carey, at 1 (noting that as of 2012 "there were approximately 1,200–1,400 positions in the executive branch requiring the Senate's advice and consent"); see STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (PLUM BOOK) (Comm. Print. 2016).

[234] 5 U.S.C. §§ 3345–3349d. For more information on the Vacancies Act, see CRS Report R44997, The Vacancies Act: A Legal Overview, by Valerie C. Brannon. In addition to the Vacancies Act, the Recess Appointments Clause allows the President to make a temporary appointment to a vacant advice-and-consent office without the consent of the Senate while the Senate is in recess. *See* U.S. CONST. art. II, § 2, cl. 3 (authorizing the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session"); Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550 (2014).

[235] *See* 5 U.S.C. § 3347(a)(1) (providing that the Vacancies Act is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [advice-and-consent] office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) ... unless" another statute "expressly" allows "an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity"). *But see id.* § 3347(b) (providing that subsection (a)(1) does not apply where a "statutory provision provid[es] *general authority* to the head of an Executive agency ... to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency") (emphasis added). *See generally* Brannon, *supra* note 234.

[236] *See* Beermann, *supra* note 74, at 110–11.

process, the Senate can seek to elicit commitments from a nominee that he or she will seek to achieve certain policies or abide by certain principles if confirmed.[237] The power of this latter tool was perhaps most dramatically exemplified in connection with the so-called "Saturday Night Massacre" of 1973, in which the Attorney General and Deputy Attorney General under President Richard Nixon resigned, successively, after being directed by the President to fire the Watergate special prosecutor, Archibald Cox. In his resignation letter, Attorney General Elliot Richardson asserted that his decision to resign was based not only on the fact that he had empowered the special prosecutor with a large measure of independence and imposed limitations on his removal, but also because, "[a]t many points throughout the confirmation hearings [for Attorney General], [he had] reaffirmed [his] intentions to assure the independence of the special prosecutor."[238]

Similarly, the Treaty Clause of the Constitution stipulates that the President may not ratify a treaty between the United States and a foreign nation or international body without senatorial consent. The Clause states that the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[239] In requiring that the President secure the consent of two-thirds of available Senators, the Clause may pose a steeper obstacle to the effectuation of executive branch responsibilities than does the Appointments Clause, which requires only the approval of a majority of Senators to a presidential nomination.[240]

The advice-and-consent function in connection with the President's treaty-making power enables the Senate to serve as a substantial check on the execution of the President's foreign relations power.[241] The Senate, for example, may withhold its consent and therefore prevent the President from ratifying a treaty. It may also supply its consent subject to certain conditions (e.g., specifying that implementing legislation is needed to give domestic legal effect to the treaty's

[237] *See id.* at 111 (writing that "approval of appointments can be used as leverage over related and even completely unrelated areas in which the Senate has an interest in the execution of the laws"). For example, prior to his confirmation as Assistant Attorney General in charge of OLC, Steven Engel agreed to review after taking office an OLC opinion—*Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1 (2017)—which asserts that individual Members of Congress do not, absent specific authorization, have authority to engage in "oversight" of the executive branch. *See* 163 CONG. REC. S4077, S4079 (daily ed. July 19, 2017).

[238] *See* Letter from Elliot Richardson, Att'y Gen'l, U.S. Dep't of Justice, to Richard M. Nixon, President, United States of America (Oct. 20, 1973), *reprinted in Ziegler Statement and Texts of Letters*, N.Y. TIMES, Oct. 21, 1973, at 61. Those "intentions" may have been given even greater weight by the fact that during his confirmation hearings, Richardson worked directly with the Senate Judiciary Committee to develop a document that ultimately formed the basis for Richardson's establishment, by regulation, of the Office of Watergate Special Prosecutor. *See* Nomination of Elliot L. Richardson to be Attorney General, Before the Senate Committee on the Judiciary, 93d Cong., 1st Sess. 144-46 (1973).

[239] U.S. CONST. art. II, § 2, cl. 2.

[240] Notably, however, while the finalization of a treaty requires Senate consent, it is the Executive who negotiates and ultimately ratifies the treaty. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("The President has the sole power to negotiate treaties, ... and the Senate may not conclude or ratify a treaty without Presidential action.").

[241] The advice-and-consent requirements of the Treaty Clause are not constitutionally required to effectuate international agreements that take the form of executive agreements under U.S. law. However, legislation may be required to authorize or implement many executive agreements. Moreover, Congress through legislation could potentially modify or abrogate the domestic legal effect of any agreement addressing matters which do not fall within the President's exclusive constitutional purview. For further discussion, see Mulligan, *supra* note 230, at 6–7. Congress may employ other tools to conduct oversight over non-treaty international agreements, including legislation that requires that the executive branch consult with Congress before or during negotiations, as well as oversight hearings. CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 242–43 (Comm. Print 2001). For more information, see *id.* at 209–43.

provisions, or making Senate approval conditional upon the reservation that the United States does not agree to be legally bound by a particular treaty provision).[242]

The Senate's Role in Impeachment: Trial and Removal

As stated above,[243] the impeachment and removal process involves distinct roles for both houses of Congress. If the House votes to impeach an official, it is the Senate that then has "the sole Power to try all Impeachments."[244] The Vice President, as President of the Senate, or the Senate Pro Tempore generally presides over impeachment trials, although the Chief Justice of the United States presides when the President has been impeached.[245] If, after the trial, two-thirds of the Senate votes to convict the official based on *any* of the articles of impeachment, the official will be removed from office.[246] After the vote to convict and remove, the Senate may, in its discretion, hold another vote to disqualify the official from "hold[ing] and enjoy[ing] any Office of honor, Trust or Profit under the United States."[247] Unlike conviction and removal, however, which requires the approval of two-thirds of the Senators present, a later vote to disqualify an official from holding future federal office requires only a majority in favor.[248] The Senate may not impose any punishment other than removal and disqualification from holding future federal office.[249]

While the full Senate votes on whether to convict an impeached official, under Impeachment Rule XI, the Senate may order the Presiding Officer of the Senate to establish a committee of Senators to receive evidence and take testimony prior to the vote.[250] This procedure was challenged in *Nixon v. United States*, which concerned the impeachment and conviction in the Senate of Walter L. Nixon, Jr., former Chief Judge of the U.S. District Court for the Southern District of Mississippi.[251] After a criminal trial, Nixon was found guilty of making false statements to a grand jury and was sentenced to prison.[252] He was then impeached by the House and tried and convicted by the Senate. During the proceedings in the Senate, the Senate established a committee under Impeachment Rule XI to receive evidence.[253] Following his senatorial conviction, Nixon brought suit in federal court, arguing that Rule XI violated the constitutional prescription that the Senate "try" impeachments because, when it is invoked, the full Senate does not take part in evidentiary hearings.[254]

The Supreme Court held that the former judge's claim posed a nonjusticiable political question and was therefore not subject to judicial review.[255] The Court decided that "the sole Power" to try

[242] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 303 cmt. d, 314(1).

[243] *See supra* "Impeachment."

[244] U.S. CONST. art. I, § 3, cl. 6.

[245] *Id.*

[246] *Id.* cls. 6, 7.

[247] *Id.* cl. 7.

[248] *See* 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 512, at 708 (1936).

[249] U.S. CONST. art. I, § 3, cl. 7. An individual convicted by the Senate, however, may be criminally prosecuted for the same facts underlying his impeachment and conviction. *See id.* (providing that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law").

[250] S. MANUAL: IMPEACHMENT RULES, RULE XI.

[251] 506 U.S. 224, 226 (1993).

[252] *Id.*; *see* United States v. Nixon, 816 F.2d 1022, 1023 (5th Cir. 1987).

[253] *Nixon*, 506 U.S. at 227.

[254] *Id.* at 228.

[255] *Id.* at 237–38.

impeachments "is reposed in the Senate and nowhere else" and concluded that the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's action."[256] Instead, the responsibility and authority for interpreting "try" lay with the Senate.[257] The Supreme Court expressed concern with the uncertainty "and the difficulty of fashioning relief" posed by allowing judicial challenges to the Senate's impeachment procedures.[258] In holding that such challenges could not be entertained on judicial review, *Nixon* stands for the practical proposition that the Senate has significant discretion over the procedures it employs during impeachment trials.

Tools for Congressional Committees

Among the tools to influence agency action available to congressional committees of both houses are the power of investigative oversight and the use of committee report language. The efficacy of these tools, which provide committees with "enormous influence over executive branch doings," reflects both committees' substantial role in the legislative system and their unique relationship with the agencies they oversee.[259] As one court has aptly described, "[o]fficials in the executive branch have to take … committees into account and keep them informed, respond to their inquiries, and it may be, flatter and please them when necessary."[260]

Committee Investigative Oversight

Congressional committees can significantly influence agency action through investigative oversight. These investigations may uncover and publicize agency abuse of authority or maladministration, prompting a legislative response or immediate change in policies by the investigated agency itself.[261] Hearings may also provide a committee the opportunity to give an agency guidance on how the committee believes an agency should carry out its functions.

Congress's power to conduct investigations complements its more prominent power to legislate and appropriate funds.[262] Although the "power of inquiry" was not expressly provided for in the Constitution, it has been acknowledged as "an essential and appropriate auxiliary to the legislative function" derived implicitly from Article I's vesting of "legislative Powers" in the

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[256] *Id*. at 229–30 (quoting U.S. CONST. art. I, § 3, cl. 6).

[257] *Id*. at 237.

[258] *Id*. at 236.

[259] Alexandria v. United States, 737 F.2d 1022, 1026 (Fed. Cir. 1984).

[260] *Id*.

[261] For example, one study has found that agency "infractions that are the subject of hearings are approximately 22% less likely to reoccur than similar infractions for which congressional committees and subcommittees choose not to hold hearings." Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23, 28 (2011). Committee investigations of the Teapot Dome scandal provide a forceful example of the investigative power's potential impact. *See* JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 232 (1965) ("As a traceable result of the Teapot Dome investigations in the 1920's, three Cabinet members were compelled to resign, of whom one went later to jail and one died while awaiting trial; two witnesses committed suicide; four oil millionaires skipped the country, and numerous other individuals were jailed or fined sums up to several million dollars.").

[262] Barenblatt v. United States, 360 U.S. 109, 111 (1959); WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (15th ed. 1913) (asserting that the "informing function of Congress should be preferred even to its legislative function"). *See also* J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951) (describing the power of investigation as "perhaps the most necessary of all the powers underlying the legislative function").

Congress.[263] The prerogative to gather information related to legislative activity is critical in purpose, as Congress "cannot legislate wisely or effectively in the absence of information," and extensive in scope, as Congress is empowered to obtain pertinent testimony and documents through investigations into a wide array of matters that relate to the legislative function.[264] Specifically, acting within relevant constitutional and jurisdictional constraints,[265] a committee may initiate investigations, hold hearings, request testimony or documents from witnesses, and, when either a government or private party is not forthcoming, compel compliance with the committee's requests through the issuance and enforcement of subpoenas.[266]

Because each house of Congress has largely delegated its constitutional oversight powers to its standing committees, congressional oversight investigations typically are carried out by congressional committees and subcommittees.[267] House and Senate rules provide each committee with a specific jurisdiction, the authority to hold hearings, and the power to require compliance with requests for information through subpoena.[268] In the House, most standing committees have also been vested with the authority to take sworn testimony through staff depositions.[269] Although hearings, subpoenas, and depositions are available tools, most investigative oversight into executive agencies is conducted through informal staff-to-staff contacts between committees and agencies.[270]

Congress has also enacted a series of laws that buttress committee investigative powers. Along with the criminal contempt statute already discussed,[271] the federal perjury, false statements, and obstruction of congressional proceeding statutes also criminalize conduct that may inhibit a congressional committee's ability to exercise its oversight power.[272] That said, congressional committees are not empowered to enforce, or even trigger enforcement of these provisions.

[263] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[264] *Id.* at 175 ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."). Congress's oversight function is subject to a variety of legal limitations. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited.... We have made it clear [] that Congress is not invested with a '"general" power to inquire into private affairs.' The subject of any inquiry always must be one 'on which legislation could be had.'" (citations omitted)).

[265] *See* Watkins v. United States, 354 U.S. 178, 206 (1957) ("Plainly these committees are restricted to the missions delegated to them").

[266] *See* McGrain v. Daugherty, 373 U.S. 135, 174 (1927) (recognizing that "[t]he power of inquiry—with process to enforce it is an essential and appropriate auxiliary to the legislative function").

[267] *See* SENATE RULE XXVI; HOUSE RULE XI. In addition, both the House and Senate have at times established temporary select committees to carry out specific investigations. A select committee's authorizing resolution often provides the committee with investigative powers such as the power to issue subpoenas. *See* H.R. Res. 567, 113th Cong. (2014) (establishing a select committee to investigate the 2012 attacks on U.S. facilities in Benghazi, Libya).

[268] SENATE RULE XXVI(1) ("Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings ... to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony.... Each such committee may make investigations into any matter within its jurisdiction.... "); HOUSE RULE XI(m)(1) (authorizing committees "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary").

[269] *See* H.R. Res. 8, 117th Cong. §3(b) (2021) (committee deposition authority).

[270] Beermann, *supra* note 74, at 122 ("Oversight is the public face of a vast network of contacts between members of Congress (and their staffs) and agency officials, including agency heads (and their staffs).").

[271] 2 U.S.C. § 192.

[272] 18 U.S.C. § 1621 (perjury); *id.* § 1001 (false statements); *id.* § 1505 (obstruction of a congressional proceeding).

Instead, enforcement—as with all criminal provisions—is carried out by the executive branch. With regard to perjury, false statements, and obstruction, a committee may refer a possible offense to DOJ with a recommendation that an investigation be initiated, but the ultimate decision on prosecution is retained by the executive branch.[273]

Federal law does, however, directly empower committees to obtain an immunity order from a federal court to compel a witness who has asserted the Fifth Amendment privilege against self-incrimination to testify.[274] Under federal law, a court order can be obtained from a United States district court following a two-thirds affirmative vote in the committee conducting the investigation.[275] So long as the committee complies with certain procedural requirements, the district court "shall grant" the immunity order when petitioned, although the Attorney General can request to delay the order.[276] While an order requires a witness to testify, the Fifth Amendment's protections prohibit the compelled testimony and any evidence derived from that testimony from being used against the witness "in any respect" in a later criminal prosecution, except one for perjury, false statement, or contempt relating to the testimony.[277]

While Congress's oversight and investigatory powers are broad, they are not unlimited. Besides jurisdictional limitations and other procedural requirements imposed by each house or a particular committee's rules,[278] other constitutional principles restrict committee investigations. Because the authority to conduct oversight and investigations is implicit in the Constitution's vesting of legislative power in Congress, any inquiry must be undertaken "in aid of the legislative function."[279] This "legislative purpose" requirement is relatively generous, and generally authorizes an investigation into any topic on which legislation could be had, including investigations undertaken to inform Congress or its committees for purposes of determining how laws function, whether new laws are necessary, whether old laws should be repealed or altered, or to conduct oversight to ensure compliance with existing law.[280] No committee, however, "possesses the general power of making inquiry into the private affairs of the citizen."[281] Moreover, the Supreme Court has determined that committee subpoenas for the President's

[273] *See* CRS Legal Sidebar, *Prosecutions of Offenses Against Congress*, by Todd Garvey.

[274] 18 U.S.C. § 6005.

[275] *Id*.

[276] *Id*.

[277] *See* Kastigar v. United States, 406 U.S. 441, 453 (1972). While the witness may still be convicted of a crime based on other evidence "wholly independent of the compelled testimony," the existence of immunized testimony can make such prosecutions more challenging. *Id*. at 460.

[278] These limits generally include ensuring that the inquiry is within the jurisdiction of the investigating committee, and undertaken in compliance with the committee's own rules. *See, e.g.*, Yellin v. United States, 374 U.S. 109, 114 (1963); United States v, Rumely, 345 U.S. 41, 47 (1953).

[279] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). *See also* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution."); Watkins v. United States, 354 U.S. 178, 187 (1957) (concluding that the investigative power "is broad ... encompass[ing] inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes").

[280] *Watkins*, 354 U.S. at 187.

[281] *Id*.

personal records involve significant separation of powers concerns that trigger a different, more scrutinizing approach to the scope of Congress's power.[282]

In addition, because a congressional inquiry is part of "lawmaking," a congressional committee engaged in an investigation generally must observe applicable constitutional restrictions and respect validly asserted constitutionally based privileges.[283] Most, though not all, provisions of the Bill of Rights addressing the rights of individuals apply to a congressional investigation.[284] For example, the First Amendment prevents a committee from interfering with a witness's free speech or associational rights without an adequate legislative interest;[285] the Fourth Amendment prevents the enforcement of an unreasonably broad subpoena;[286] and the Fifth Amendment may be asserted in response to a congressional subpoena when compliance would tend to incriminate the witness.[287]

Assertions of executive privilege may be invoked to limit a committee's authority to obtain information from executive branch agencies.[288] Executive privilege is generally viewed as having two components: the deliberative process privilege, which protects the decisionmaking process of the entire executive branch;[289] and the presidential communications privilege, which preserves the confidentiality of direct decision making of the President.[290] Both privileges are grounded in the notion that the executive branch must be able to discuss different options and approaches candidly without fear that its communications will become public.[291]

The deliberative process privilege is often implicated during committee investigations into agency decisionmaking, and as a result, may prompt conflict between committees and agencies. While the Supreme Court has found the presidential communications privilege to be implied in the Constitution,[292] the legal source from which the deliberative process privilege stems is less

[282] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032-36 (2020). In *Mazars*, the Court identified at least four "special considerations" to help lower courts to appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President" when a committee subpoena seeks the President's private papers. *Id.* at 2035.

[283] *Id.* at 197 ("While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process.").

[284] For example, the D.C. Circuit has held that because of the "investigative" rather than "criminal" nature of committee hearings, the Sixth Amendment's individual criminal procedural guarantees, including a party's right to "present evidence on one's own behalf and to confront and cross examine one's accusers," do not apply. United States v. Fort, 443 F.2d 670, 678–81 (D.C Cir. 1970).

[285] *Watkins*, 345 U.S. at 197 ("Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly.").

[286] McPhaul v. United States, 364 U.S. 372, 282–83 (1960).

[287] Quinn v. United States, 349 U.S. 155, 161 (1955); Emspak v. United States, 349 U.S. 190, 194 (1955).

[288] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974).

[289] A document is only protected under the privilege if it is (1) "predecisional" (i.e., communications made prior to reaching an agency decision) and (2) "deliberative" (i.e., communications relating to the thought process of executive officials that are not "purely factual"). *See In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997).

[290] *See id.* at 745 ("While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes."). For a thorough discussion of executive privilege, see CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey.

[291] *See* United States v. Nixon, 418 U.S. 683, 708 (1974) (describing the "public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making"); *Lynch*, 156 F. Supp. 3d at 111 (noting that the purpose of the deliberative process privilege "is to protect the decision-making process within government agencies and to encourage 'the frank discussion of legal and policy issues' by ensuring that agencies are not 'forced to operate in a fishbowl'") (citations omitted).

[292] *Nixon*, 418 U.S. at 708 (concluding that the presidential communications privilege is "inextricably rooted in the

clear. Whereas one court has suggested that the privilege "is primarily a common law privilege,"[293] another has held that it has "constitutional dimension[s]."[294] Yet because congressional committees have generally claimed discretion in whether to recognize common law privileges asserted by a witness,[295] the legal source of the deliberative process privilege may affect the degree to which the privilege limits congressional investigations.[296]

Informal Committee Controls: Report Language

While legislative enactments have the force and effect of law, committees may also use non-binding report language associated with passed legislation to influence agency action.[297] Report language draws its ability to influence not from the law, but from the committee's relationship with the agencies it oversees.[298] This tool may be used to direct the use of appropriated funds, as well as to guide an agency in implementing delegated authority.[299]

In general, committee report language refers to any information provided in a report that accompanies legislation approved by the committee.[300] When directed toward agencies, committee report language generally is used to communicate committee preferences to the agency tasked with carrying out the measure once it becomes law. The purpose of committee report language can range from explaining the committee's interpretation of certain provisions of the bill to directly articulating a requirement or prohibition on the agency which may not be directly referenced in the bill's text.[301] Although report language itself is not legally binding in the same

separation of powers under the Constitution")

[293] *In re* Sealed Case, 121 F. 3d 729, 737 (D.C. Cir. 1997) (opining that, while the "privilege is most commonly encountered in [FOIA] litigation, it originated as a common law privilege").

[294] *Lynch*, 156 F. Supp. 3d at 104 (concluding that "the privilege could be properly invoked in response to a legislative demand").

[295] *But see* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020) (suggesting that recipients of a subpoena "have long been understood to retain common law … privileges"). For a discussion of the application of common law privileges in congressional investigations, see Davis et al., *Congressional Oversight Manual*, *supra* note 189, at 61-64.

[296] *See* H. COMM. ON NAT. RES. RULE 4(g) ("Claims of common-law privileges made by witnesses in hearings, or by interviewees or deponents in investigations or inquiries, are applicable only at the discretion of the Chairman, subject to appeal to the Committee.").

[297] *See* Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (holding that "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency") (internal quotation marks omitted). Committee report language, in addition to other forms of legislative history, can also impact how a court interprets ambiguous statutory language. *See* Garcia v. United States, 469 U.S. 70, 76 (1984) (noting that committee reports are an "authoritative source for finding the Legislature's intent").

[298] *See Vigil*, 508 U.S. at 193 (reasoning that although report language cannot impose legally binding restrictions, "an agency's decision to ignore congressional expectations" as articulated in congressional reports "may expose it to grave political consequences").

[299] *See* CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS 485 (5th ed. 2000) ("It has been common practice for committees, including House-Senate conference committees, to write in their reports instructions directing government agencies on interpretation and enforcement of the law.").

[300] Report language is also commonly included in the joint explanatory statement accompanying the conference report issued by a conference committee of the House and Senate. In recent years, it has become common for the chambers, when resolving their legislative differences in a manner other than by conference committee, to publish an "Explanatory Statement" or "Statement of Managers" which serves the same purpose. *See* CRS Report R44124, *Appropriations Report Language: Overview of Development, Components, and Issues for Congress*, by Jessica Tollestrup.

[301] *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers,*

manner as statutory text,[302] agencies usually seek to comply with any directives contained within a committee report.[303] If an agency ignores report language, it runs the risk of offending its appropriating committee or another committee with jurisdiction over it, increasing the likelihood of future informal committee-imposed consequences or more formal legislative consequences imposed by Congress at the behest of the committee.[304]

In the appropriations context, report language has been used as a non-binding alternative to the types of committee controls held unconstitutional in *Chadha*.[305] For example, committees have inserted language into committee reports that purport to require an agency to obtain the committee's approval before reprogramming funds.[306] In other instances, agencies have reached informal agreements in which the agency accedes to some form of limited committee control over agency decisionmaking.[307] Because report language and other informal arrangements between an

and the Enactment Process, 52 CASE W. RES. 489, 561–63 (2001). *See, e.g.*, H.R. REP. NO. 456, at 75 (2020) ("The Committee believes [the General Services Administration (GSA)] has the authority and discretion to upgrade GSA-controlled buildings containing child care centers to meet minimum security standards. The Committee directs GSA to pursue implementation of these countermeasures by either gaining tenant agency approvals and amortizing the costs into their occupancy agreements or incorporating the upgrades necessary into existing building repairs and alterations projects.").

[302] *See* Clinton Mem'l Hosp. v. Shalala, 10 F.3d 854, 858 (D.C. Cir. 1993) (questioning the force of a committee report that was "neither adopted by the House nor presented to the President"). Committee report language can become binding if it is incorporated by reference into the enacted law. *See* 64 COMP. GEN. 359 (1985) ("It is a general principle of appropriation law that directions in committee reports, floor debates and hearings, or statements in agency budget justifications are not legally binding on an agency unless they are incorporated, either expressly or by reference, in an appropriation act itself or in some other statute.").

[303] RICHARD FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 18 (1966) ("[T]he criticisms and suggestions carried in the reports accompanying each bill are expected to influence the subsequent behavior of the agency. Committee reports are not the law, but it is expected that they be regarded almost as seriously.").

[304] Roberts, *supra* note 301, at 562–63 (noting that "agencies make special efforts to catalogue and track" report language that interprets ambiguous statutory language, and arguing that "[t]hey do so not because committee report language is 'law' in the same sense as the statute is law, but rather because committee direction is part of the complicated system of communication between Congress and the agencies, involving authorization of new programs, appropriation of funds, and general oversight of agency operations"); *In re* LTV Aerospace Corp., 55 Comp. Gen. 307, 324–25 (1975) ("This does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive Branch ... has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.").

[305] *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 651 (2006) ("The obvious question raised is why federal agencies comply with these directives when it is clear that they formally lack the force of law. The answer lies in the agency's working assumption that an agency cannot afford to risk angering the legislative committee that is primarily responsible for its current and future appropriations.").

[306] *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 595, 613 (1998) ("Many federal agencies and their congressional appropriation subcommittees routinely agree to a set of reprogramming procedures. Most commonly, the agency agrees to obtain subcommittee approval before departing substantially from—that is, 'reprogramming'—the expenditure breakdown that the agency advanced in its budget justifications or that committee adopted in the report accompanying the agency's appropriations. There is a general agency practice of adhering to reprogramming agreements–a practice so well established that in most cases the agreements are treated as 'binding' by all concerned."). For additional examples of "directives" contained in committee reports *see* Lazarus, *supra* note 305, at 649–52 (discussing committee report language pertaining to the obligations of Environmental Protection Agency, the Fish and Wildlife Service, and the Forest Service).

[307] *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 289–90 (1993) (describing an informal agreement between the National Aeronautics and Space Administration and congressional committees in which the agency pledged to comply with spending caps found in a conference report); FENNO, *supra* note 303, at 21–24.

agency and a committee do not have the force and effect of law, these tools do not violate constitutional principles of presentment and bicameralism laid out by the Supreme Court in *Chadha*.[308] If agencies comply with committee report language, they do so voluntarily. As one appellate court has noted, "there is nothing unconstitutional about … such informal cooperation."[309]

Tools for Individual Members

Individual Members also have several tools at their disposal to influence agency action. Members may seek the disclosure of information from agency officials through voluntary cooperation. And procedural rules and customary practices of the House, Senate, or committees may accord specific powers to individual Members that enable them to exert some level of influence over matters affecting administrative agencies.[310] For example, committee rules typically provide committee chairs significant authority to compel disclosure of information from administrative agencies or engage in other oversight activities on behalf of their committees on matters within those committees' jurisdiction.[311] And if an individual Member *is* authorized by a committee, house, or Congress as a whole, the Member may be "endowed with the full power of the Congress to compel testimony,"[312] for, as the Supreme Court has recognized, "each Member of Congress is 'an officer of the union, deriving his powers and qualifications from the [C]onstitution.'"[313]

Individual Members may also avail themselves of certain statutes to obtain information from administrative agencies. For instance, 5 U.S.C. § 2954 (also known as the "Seven Member Rule"[314] or "Rule of Seven" statute[315]) provides that, upon receipt of a request for information from any seven Members of the House Oversight and Government Reform Committee or five Members of the Senate Committee on Homeland Security and Governmental Affairs, an executive agency "shall submit any information requested of it relating to any matter within the jurisdiction of the committee."[316] Other statutes authorize or require agencies to disclose records

[308] *See supra* "Constitutional Limits on Non-statutory Legislative Actions" (discussing Immigration & Naturalization Servs. v. Chadha, 462 U.S. 919 (1983)); *cf.* Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 684 (9th Cir. 2007) ("Members of Congress cannot use committee report language to make an end run around the requirements of Article I. If Congress wishes to alter the legal duties of persons outside the legislative branch, including administrative agencies, it must use the process outlined in Article I.").

[309] Alexandria v. United States, 737 F.2d 1022, 1026 (Fed. Cir. 1984).

[310] For example, as a matter of institutional practice, individual Senators can delay consideration of executive branch nominees by placing "holds" on nominations and delay or even prevent consideration of legislation affecting administrative agencies via the filibuster. *See* Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 202, 205–06 (1998); CRS Report 96-548, *The Legislative Process on the Senate Floor: An Introduction*, by Valerie Heitshusen, at 3. And individual Members of the House can introduce resolutions of inquiry. *See supra* "Resolutions of Inquiry." Procedural rules, however, may also prohibit individual Members from engaging in certain actions, such as issuing subpoenas. *See* HOUSE RULE XI 2(m)(1), (3); SENATE RULE XXVI(1).

[311] Some committees, for instance, authorize their chair to issue subpoenas. *See, e.g.*, S. COMM. ON THE JUDICIARY RULE IX.

[312] Watkins v. United States, 354 U.S. 178, 200–01 (1957).

[313] United States Term Limits v. Thornton, 514 U.S. 779, 803 (1995) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (1833)).

[314] Cummings v. Murphy, 321 F. Supp. 3d 92, 95 (D.D.C. 2018).

[315] *See* Davis et al., *Congressional Oversight Manual*, *supra* note 189, at 72.

[316] 5 U.S.C. § 2954. While the agency's responsibility to provide the requested information is drafted in mandatory terms, courts have, in certain instances, refused to assert jurisdiction over suits concerning agency non-compliance with

that are otherwise exempt from disclosure specifically to an individual Member of Congress.[317] Individual Members may also secure information through reliance on the statutory authority granted certain investigative agencies—such as the Government Accountability Office—to investigate and oversee administrative agencies.[318] In addition, individual Members may submit requests for agency records under FOIA.[319]

Individual Members may also seek to influence or control the executive branch through the initiation of lawsuits challenging executive branch action. However, an individual Member who wishes to institute such a lawsuit faces a significant obstacle unrelated to the merits of his or her case. After the Supreme Court's 1997 decision in *Raines v. Byrd*,[320] an individual Member

Section 2954. *See, e.g.*, *Cummings*, 321 F. Supp. 3d 92. However, in *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020), the D.C. Circuit held that the ranking and seven other Members of the House Oversight Committee had standing to challenge the General Services Administration's (GSA's) refusal to provide information to the Members pursuant to their request under Section 2954. *Id.* at 54. The Court explained that GSA's "failure to provide information to which the [Members] are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III" of the Constitution. *Id.* at 59. The court remanded the case to the district court, however, so the lower court could determine the remaining questions in the case, including whether Section 2954 provides a cause of action and, even so, whether it applies to the information at issue. *Id.* at 58, 70.

[317] *See, e.g.*, 6 U.S.C. § 623(f) (providing that "[n]othing in this section shall prohibit the Secretary [of the Department of Homeland Security] from disclosing [security related information developed under the Chemical Facility Anti-Terrorism Standards Program] to a Member of Congress in response to a request by a Member of Congress"); 19 U.S.C. § 4203(a)(1)(B) (providing that, "[i]n the course of negotiations conducted under this chapter, the United States Trade Representatives shall ... upon request of any Member of Congress, provide access to pertinent documents relating to the negotiations, including classified materials"). Many statutes authorize or direct agencies to disclose certain records to Congress or congressional committees, but do not specifically include a reference to individual Members. For example, under the Privacy Act, an agency may disclose otherwise protected information about an individual "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." *Id.* § 552a(b)(9). Similarly, FOIA's "special- access" provision states that FOIA does not enable agencies "to withhold information from *Congress*." *Id.* § 552(d) (emphasis added). DOJ has concluded that generally committee chairs are the only individual Members authorized to obtain records on behalf of committees under the congressional-disclosure provision of the Privacy Act and FOIA's special- access provision. Under DOJ's interpretation, even ranking minority members are unable to obtain records pursuant to these provisions, absent authorization. *See* Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 1, 1 (2017) (opining that "the constitutional authority to conduct oversight ... may be exercised only by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen)") (internal citation and quotation marks omitted); Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members, 25 Op. O.L.C. 289, 289–90 (2001) (asserting that "the Privacy Act's congressional-disclosure exception does not generally apply to disclosures to ranking minority members"); DEP'T OF JUSTICE, OFFICE OF INFO. POL'Y, FOIA UPDATE: OIP GUIDANCE: CONGRESSIONAL ACCESS UNDER FOIA 1–2 (1984) (stating that disclosure under FOIA's special-access rule to an individual Member is only appropriate where the request is made "by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee"). For an overview of FOIA's special access provision, *see* Sheffner, *FOIA*, *supra* note 109, at 49-51. DOJ's interpretation, however, is not universally held. *See, e.g.*, Murphy v. Dep't of the Army, 613 F.2d 1151, 1157 (D.C. Cir. 1979) (writing, in dicta, that "[i]t would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress").

[318] *See, e.g.*, Nat'l Ass'n of Chain Drug Stores v. HHS, 631 F. Supp. 2d 17, 22 (D.D.C. 2009) (holding that "it is irrelevant that [the Government Accountability Office (GAO)] exercises [its statutory authority under 31 U.S.C. § 717(b)(1) to investigate the disbursement, receipt, and use of public money] at the request of an individual member of Congress" and ordering the Department of Health and Human Services to disclose information to GAO).

[319] 5 U.S.C. § 552. *See* Sheffner, *FOIA*, *supra* note 109, for more information on FOIA.

[320] 521 U.S. 811 (1997). In *Raines*, the Supreme Court held that individual Members of Congress who had voted against the Line Item Veto Act of 1996, P.L. 104-130, 110 Stat. 1200, did not have standing to sue. 521 U.S. at 829. The Member-plaintiffs alleged that the Act (1) "alter[ed] the legal and practical effect" of their votes on bills covered by the Act, (2) "divest[ed them] of their constitutional role in the repeal of legislation," and (3) "alter[ed] the

generally will have standing[321] to sue an executive branch agency or official in federal court only if his or her complaint alleges a *personal* injury (e.g., the loss of a congressional seat).[322] The only *institutional* injury the Supreme Court has recognized as sufficient to confer standing upon individual legislators occurs when legislators' votes have been nullified by executive action,[323] a narrow category of injury that individual Members have struggled to allege successfully.[324] After *Raines*, few legislators who lack authorization from their relevant house of Congress have been granted standing to pursue a civil action against the executive branch.[325]

constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress." *Id.* at 816. The Supreme Court, however, held that the plaintiffs were without standing to pursue their claim because they did not allege a personal injury to themselves and the institutional injury they asserted "was wholly abstract and widely dispersed." *Id.* at 829.

[321] To pursue a lawsuit in federal court, a plaintiff must have "standing." The standing doctrine is derived from Article III of the Constitution, which limits federal courts' jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. Under Article III, a plaintiff has standing only if he alleges "that he '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016)).

[322] *Raines*, 521 U.S. at 829 (citing Powell v. McCormack, 395 U.S. 486 (1969)). In *Powell*, the Supreme Court concluded that it had jurisdiction to entertain Representative Adam Clayton Powell, Jr.'s challenge to his exclusion from the House. 395 U.S. at 549–50. In *Raines*, the Supreme Court distinguished the plaintiffs' challenge therein from that raised in *Powell*, reasoning that Representative Powell's injury amounted to the "loss of [a] private right"—the Representative's loss of his seat and concomitant congressional salary—which was a personal and far more concrete injury than the abstract "loss of political power" that characterized the plaintiffs' injury in *Raines*. 521 U.S. at 820–21.

[323] *See* Coleman v. Miller, 307 U.S. 433 (1939). In *Coleman*, the Kansas state senate had been evenly divided on a proposed amendment to the U.S. Constitution, with twenty senators voting in favor and twenty against the amendment. The lieutenant governor cast the deciding vote in favor. *Id.* at 435–36. The twenty senators who opposed the amendment (as well as an additional senator and three members of the state's lower chamber) brought suit, challenging the lieutenant governor's authority to cast the tie-breaking vote. *Id.* at 436. The Supreme Court held that the legislators had standing to sue, reasoning that they "have a plain, direct and adequate interest in maintaining the effectiveness of their votes," and emphasizing that "if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id.* at 438. The *Raines* Court later clarified that "our holding in *Coleman* stands (at most []) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified." 521 U.S. at 823. Courts often hold that vote nullification is not present where legislative remedies (e.g., the ability to pass corrective legislation) are available to Member-plaintiffs. *See* Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000); Kucinich v. Obama, 821 F. Supp. 2d 110, 120 (D.D.C. 2011); *see also Raines*, 521 U.S. at 829 ("We also note that our conclusion [does not] deprive[] Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach)").

In *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court summarized *Raines* as standing for the principle that "individual members lack standing to assert the institutional interests of a legislature." *Id.* at 1953. However, the Court did not overrule *Coleman* in *Bethune-Hill*. Instead, it distinguished *Coleman* from the case before it, writing that, "[u]nlike *Coleman*, this case does not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote." *Id.* at 1954.

[324] *See, e.g.*, Chenowith v. Clinton, 181 F.3d 112, 116–17 (D.C. Cir. 1999) (holding that individual Members' alleged institutional injuries did not constitute vote nullification); *Campbell*, 203 F.3d at 22–23 (same); *Kucinich*, 821 F. Supp. 2d at 120 (same).

[325] *See* Common Cause v. Biden, 909 F. Supp. 2d 9, 26 (D.D.C. 2012) (remarking at the time that "the Court is not aware of any case in this Circuit where a court has recognized legislative standing after *Raines*"). In *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam), the D.C. Circuit held that 215 individual Members of Congress—who did not represent the House of Representatives or Senate—lacked standing to sue former President Donald Trump for allegedly violating the Foreign Emoluments Clause of the Constitution, *see id.* at 16, 20 n.4.

Individual Members may also participate in litigation against the executive branch—albeit not as parties—by appearing as amici curiae ("friends of the court") in pending proceedings.[326] An amicus curiae is "[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."[327] Members of Congress may file amicus briefs in judicial proceedings for a variety of reasons, including to articulate specific policy views, assert the purported meaning of statutory provisions at issue in the litigation in question, or defend the prerogatives or interests of the legislative branch.[328] While they certainly cannot be used to control agency action, amicus briefs filed by Members of Congress in proceedings involving the executive branch may be useful in alerting executive branch components or officials to the views of certain Members on matters central to executive branch programs and powers.

As has been shown, individual Members of Congress may exert some measure of influence over administrative agencies. But courts have imposed important limitations on their ability to do so. Chief among these limits is the prohibition—grounded in procedural due process—against legislator-interference with agency adjudications in certain contexts.[329] In the seminal 1966 decision of *Pillsbury Co. v. FTC*,[330] the Fifth Circuit invalidated an FTC decision that the agency had issued after the FTC Chair and other Commissioners had faced congressional questioning during a Senate subcommittee hearing that focused "directly" and "substantially" on the agency's decisionmaking process in a pending case.[331] The court explained that when Congress interferes with the "*judicial* function" of an agency proceeding, "we become concerned with the right of private litigants to a fair trial and ... the appearance of impartiality."[332] Later, in *D.C. Federation of Civic Associations v. Volpe*, the D.C. Circuit explained that *Pillsbury* applies to "judicial or quasi-judicial" administrative proceedings, not informal proceedings.[333] The court defined judicial or quasi-judicial proceedings as those in which the agency's decision must be based

[326] *See, e.g.*, Brief of Amici Curiae Members of Congress in Support of Respondents, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354, 2014 WL 466855 (Jan. 28, 2014); Amicus Curiae Brief of the Speaker of the United States House of Representatives, John Boehner, in Support of Respondent, Nat'l Labor Relations Bd. v. Noel Canning, No. 12-1281, 2013 WL 6173789 (Nov. 25, 2013); Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny Hoyer—as Amici Curiae in Support of Plaintiffs—Appellees and Urging Affirmance, Massachusetts v. HHS, Nos. 10-2204, 10-2207, 10-2214, 2011 WL 5833107 (1st. Cir. Nov. 3, 2011).

[327] *Amicus Curiae*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

[328] Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 946 (2012); *see also* Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. 933, 940 (2015) (opining that "amicus filings are an easy, low-cost mechanism for lawmakers to stake out policy positions").

[329] *See, e.g.*, ATX, Inc. v. Dep't of Transp., 41 F.3d 1522, 1527 (D.C. Cir. 1994) (declaring that "[a]n administrative adjudication is 'invalid if based in whole or in part on [congressional] pressures'") (second alteration in original) (quoting Dist. of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971)));))). Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (holding that "when ... [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission[er] *in a case which is pending before it* ... we become concerned with the right of private litigants to a fair trial and ... with their right to the appearance of impartiality"); *see also* Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 197–202 (2013); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 409 (D. Conn. 2008) (asserting that "[c]ongressional interference in the administrative process is of particular concern in a quasi-judicial proceeding").

[330] 354 F.2d 952 (5th Cir. 1966).

[331] *Id.* at 964.

[332] *Id.* The type of interference experienced by the agency officials, declared the court, "sacrifices the appearance of impartiality—the *sine qua non* of American *judicial* justice." *Id.*

[333] *D.C. Fed'n*, 459 F.2d at 1246 & n.75; *id.* at 1247.

"solely on a formal record established at a public hearing,"[334] which is very similar to the APA's definition of formal adjudication.[335] The mere appearance of impartiality can indicate improper congressional interference in regard to such proceedings.[336] However, the D.C. Circuit held that, for informal proceedings, more is needed to render an official's decision invalid—it must be shown that he "took into account considerations that Congress could not have intended to make relevant."[337] Based on *D.C. Federation*, the D.C. Circuit later held that an agency's regulation will be held invalid because of legislator pressure only if (1) the intent of the interference is to compel the agency "to decide upon factors not made relevant by Congress in the applicable statute," and (2) the agency's decision is "affected by those extraneous considerations."[338]

Conclusion

Congress has an array of tools at its disposal to influence and control executive branch agencies. Through the exercise of its legislative power and subject to certain limitations rooted mainly in the separation of powers, Congress may not only establish federal agencies and individual agency offices, but also shape agencies' basic structures and operations, set the manner in which those holding agency offices are appointed and removed, and delegate lawmaking authority to agencies. In addition, Congress may directly reverse certain agency actions and decisions through later legislation. But Congress need not confine itself to the legislative process to exert control or influence over executive branch agencies or officials. Many non-statutory tools that inhere to Congress as a whole, the House or Senate exclusively, committees, or even individual Members of Congress may be used to influence or, in some cases, control agencies or officials. Some of

[334] *Id.* at 1247.

[335] Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 44 (1996) (explaining that "[t]he APA uses virtually the same criterion in delimiting the realm of formal adjudication" as *D.C. Federation* used in defining "judicial" and "quasi-judicial" proceedings); *cf. id.* ("While the contours of the Due Process Clause may not depend directly on the APA's definition of formal proceedings, adjudications have not been considered 'judicial' within the meaning of *Pillsbury* unless they involve highly structured, adversary litigation."). As discussed above, when an "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing," formal, trial-like procedures govern proceedings. 5 U.S.C. § 554(a). These adjudications are known as "formal" adjudications. *See supra* "Procedural Controls on Decisionmaking."

The APA generally prohibits "interested person[s] from outside the [relevant] agency" from making "ex parte communication[s] relevant to the merits of [a] proceeding" to the decisionmaker in a formal adjudication proceeding, or to another "employee who is or may reasonably be expected to be involved in the decisional process of the proceeding." 5 U.S.C. § 557(d)(1)(A). An "ex parte communication" is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." *Id.* § 551(14). Legislative history indicates that the prohibition applies to Members of Congress. *See* H.R. REP NO. 880, pt. 1, at 21-22 (1976). It does not, however, cover "requests for status reports." 5 U.S.C. § 551(14).

[336] *D.C. Fed'n*, 459 F.2d at 1246-47; *see* DCP Farms v. Yeutter, 957 F.2d 1183, 1187 (5th Cir. 1992) ("*Pillsbury* holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings."); Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 169 (D.C. Cir. 1983) ("The [*D.C. Federation*] court indicated that if the decision had been judicial or quasi-judicial, it could be invalidated by 'the appearance of bias or pressure.'") (quoting *D.C. Fed'n*, 459 F.2d at 1246).

[337] *D.C. Fed'n*, 459 F.2d at 1247 (internal quotation marks and citation omitted); *accord id.* at 1248 (explaining that the Secretary of Transportation "must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations"); *Peter Kiewit Sons' Co.*, 714 F.2d at 169 (writing that the *D.C. Federation* "court noted that the test for improper interference [for non-judicial or -quasi-judicial proceedings] was whether the congressional action *actually* affected the decision").

[338] Sierra Club. v. Costle, 657 F.2d 298, 310 (D.C. Cir. 1981) (citing Dist. of Columbia *D.C. Fed'n* of Civic Ass'ns v. Volpe, 459 F.2d 1231 at 1246–47 (D.C. Cir. 1971)).). *See* State v. Dep't of the Interior, 363 F. Supp. 3d 45, 63 n.15 (D.D.C. 2019) (explaining that the *Costle* standard "was based directly on the [*D.C. Fed'n*] standard" but acknowledging that a rulemaking proceeding "may allow for more political wrangling than an agency's adjudication of an individual request").

these non-statutory tools, such as impeachment and removal, are of potentially legally binding effect. Other tools, such as censure or resolutions of inquiry, are not legally compulsory, but are possibly powerful tools of influence.

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